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# Path Dependence and the External Constraints on Independent State Constitutionalism

Lawrence Friedman\*

## INTRODUCTION

The promise of “the New Judicial Federalism”—of the independent interpretation by state courts of state constitutional corollaries to the federal Bill of Rights—has gone largely unfulfilled. In terms of doctrinal development, the project of independent state constitutionalism, launched in earnest decades ago with the publication of United States Supreme Court Justice William Brennan’s call to arms in the pages of the *Harvard Law Review*,<sup>1</sup> is today more an aspiration than a practice. State courts often do not engage in the difficult task of trying to establish doctrinal tests that do not flow from federal precedent. Still, this does not mean that state courts cannot make valuable contributions to constitutional discourse—to the ongoing discussion among judges, advocates, commentators and citizens about constitutional meaning. Despite the constraints on the ability of these courts to innovate

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\* Professor of Law, New England School of Law. My thanks to Bob Williams, for many years of terrific and inspiring conversations about state constitutional law, and his careful review of this article; to Elizabeth Sullivan, for putting up with me and for reading every word of this article more than once; to my friends and colleagues, Phil Hamilton, Victor Hansen, Johanna Kalb, Jack Landau, Justin Long, Michael Meltsner, and Louis Schulze, for their thoughtful comments and suggestions; and to Julianne Fitzpatrick and Jordan Baumer, for their able research assistance. I am grateful to Gary Gildin and Jamison Colburn for inviting me to present an earlier version of this article at Penn State University’s Dickinson School of Law. This article would not have been possible without the support of Dean John F. O’Brien and a summer research stipend from New England Law. All errors are of course mine alone.

1. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). Brennan’s article “promoted a great awakening of state constitutionalism as the antidote to the United States Supreme Court’s increasing tendency to defer to government actors, rather than maintain or expand Warren Court era human rights protections.” Justin Long, *Intermittent State Constitutionalism*, 34 PEPP. L. REV. 41, 50-51 (2006).

doctrinally, independent state constitutional interpretation in individual rights cases remains normatively desirable. That said, we must temper our expectations about what state courts actually may be able to accomplish.

I am not the first commentator to suggest the promise of the New Judicial Federalism has not been met. In an article published nearly twenty years ago,<sup>2</sup> as well as a more recent book on the subject,<sup>3</sup> James Gardner identified issues with independent state constitutional interpretation that persist. He argues that state courts, for example, “often appropriate and adopt federal constitutional doctrine as the rule of decision for state constitutional provisions not only when the state constitutional text is identical to its federal counterpart, but even when it differs in potentially significant ways.”<sup>4</sup> Gardner points to the determination by the Massachusetts Supreme Judicial Court to interpret the Massachusetts Constitution’s protection against unreasonable searches and seizures according to the same doctrinal standards adopted by the United States Supreme Court in respect to the Fourth Amendment—despite differences in the language of the two constitutional provisions.<sup>5</sup>

To the extent I have resisted the argument that independent state constitutional interpretation of individual rights protections is problematic in the way Gardner describes, I was persuaded to revisit my thinking in light of an experience that put the issue in context. In late 2009, a local public defender asked whether I would be interested in writing an amicus brief in a case, *Commonwealth v. Ortiz*,<sup>6</sup> then pending before the Massachusetts Supreme Judicial Court. She thought I might provide a state constitutional law perspective on the issue at hand—whether, under Part I, Article 14, the Massachusetts search and seizure provision, proof that the police omitted material facts in a search warrant application undermines the validity of the warrant.<sup>7</sup> The case raised the question of how far to extend, under Massachusetts law, the reasoning underlying *Franks v. Delaware*,<sup>8</sup> in which the United States Supreme

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2. James Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761 (1992).

3. JAMES GARDNER, *INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM* (University of Chicago Press 2005).

4. *Id.* at 6-7.

5. *See id.* at 7.

6. *Commonwealth v. Ortiz*, No. 06-969-972, 2007 WL 7079995 (Mass. Super. Ct., June 11, 2007) (Memorandum of Decision and Order on Defendants’ Motions to Suppress).

7. State constitutional search and seizure protections are frequently litigated. *See* Michael J. Gorman, *Survey: State Search and Seizure Analogs*, 77 MISS. L.J. 417 (2007).

8. *Franks v. Delaware*, 438 U.S. 154 (1978).

Court, interpreting the Fourth Amendment, held that intentional misstatements do not undermine a warrant application, so long as the application contains a basis for probable cause even absent the misstatements.<sup>9</sup>

The case began in April 2006, with a shooting in Marlborough, Massachusetts. Several weeks later, local police showed a photo array to a witness who identified one of the men as someone he believed was involved in the shooting. Though his photo was in the array, the witness did not identify the defendant, Angel Ortiz. Other witnesses also failed to identify Ortiz in the photo array. The application for a warrant to search Ortiz's residence did not note these failed identifications. The magistrate issued the warrant and police found a firearm and cocaine in a room in which the defendant resided.<sup>10</sup>

In the trial court, the defendant argued that the evidence seized must be suppressed because the affidavit attached to the warrant application omitted material facts.<sup>11</sup> As the trial court put it, "[t]he affiant described the identifications of [one defendant,] but omitted the failures of the same witnesses to identify the photograph of Ortiz and the fact that two of the witnesses said that [another man] 'looked like' the shooter or words to that effect."<sup>12</sup> Quoting from *Franks*, the trial court in *Ortiz* noted that the Fourth Amendment entitles a defendant to an evidentiary hearing in these circumstances—but only if he "makes a substantial preliminary showing that a false statement knowingly or intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause."<sup>13</sup> The Massachusetts Supreme Judicial Court has indicated that a similar analysis should be applied under Article 14, and slightly expanded the *Franks* rule by acknowledging the right of a trial court, in its discretion, "to hold a hearing merely on a showing that an affidavit contained misstatements of fact, particularly material misstatements."<sup>14</sup>

The trial court concluded that the defendant was entitled to a hearing, and that the fact that witnesses had failed to identify Ortiz in the photo array should have been included in the affidavit.<sup>15</sup> As the court observed, the failure to include that information appeared "particularly questionable" given that one of the witnesses reported seeing the shooter

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9. See *Ortiz*, 2007 WL 7079995, at \*7.

10. See *id.*

11. See *id.*

12. *Id.* at 7.

13. *Id.* (quoting *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978)).

14. *Commonwealth v. Douzanis*, 425 N.E.2d 326, 330 (Mass. 1981).

15. *Ortiz*, 2007 WL 7079995, at \*7.

“while on the way to the police station to view photographic arrays.”<sup>16</sup> Nonetheless, the court ruled against suppression: “Where the cited omissions do not affect the existence of probable cause, no inquiry is necessary concerning whether the omissions were intentional or reckless.”<sup>17</sup> In the trial court’s view, the omitted information would not have altered the probable cause determination.<sup>18</sup>

A jury convicted the defendant of possession with intent to distribute cocaine. On appeal, he argued that Article 14 requires suppression when the police seize evidence pursuant to a warrant based upon an application from which exculpatory information was deliberately omitted, regardless of the effect of the omissions on the existence of probable cause.<sup>19</sup> The defendant’s brief begins with a discussion of *Franks* and the constitutional doctrine that case establishes, noting that individuals may also challenge a warrant based upon material omissions from the application,<sup>20</sup> as the Supreme Judicial Court suggested in a case concerning the interpretation of Article 14 called *Commonwealth v. Nine Hundred and Ninety-Two Dollars*.<sup>21</sup>

In *Nine Hundred and Ninety-Two Dollars*, the court expressed some doubt as to whether the focus on the ultimate existence of probable cause would be sufficient to deter police dissembling in warrant applications. The court stated: “if a police affiant committed perjury on a matter that may have influenced the magistrate’s finding of probable cause, arguably the warrant should be invalidated (and the fruits of the search excluded) even if the nonperjurious aspects of the warrant would have justified a finding of probable cause.”<sup>22</sup> Indeed, other state high courts have concluded that, where the police obtained search warrants on the basis of intentional misstatements, evidence seized should be deemed inadmissible.<sup>23</sup>

Relying upon *Nine Hundred and Ninety-Two Dollars* and the cases in which other state courts had similarly held, the defendant focused

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16. *Id.*

17. *Id.* at 7-8 (citing *Franks*, 438 U.S. at 155-56 and *Commonwealth v. Corriveau*, 486 N.E.2d 29, 40 (Mass. 1985)).

18. See *Ortiz*, 2007 WL 7079995 at \*8.

19. Brief for Defendant at 1, *Commonwealth v. Ortiz*, No. SJC-10466 (Mass. May 14, 2009).

20. *Id.* at 16.

21. *Commonwealth v. Nine Hundred and Ninety-Two Dollars*, 422 N.E.2d 767 (Mass. 1981).

22. *Id.* at 770-71.

23. See, e.g., *State v. Casey*, 775 So. 2d 1022, 1029 (La. 2000) (holding that material misrepresentations intended to deceive require suppression); *State v. Malkin*, 722 P.2d 943, 946 n.6 (Alaska 1986) (holding a search warrant issued on basis of intentional misstatements invalid, regardless whether there was probable cause absent the misstatements).

upon the nature of the omission in his case. He argued that an intentional omission is akin to a deliberate misstatement, as distinguished from a negligent error.<sup>24</sup> As the defendant's brief stated, there is no principled basis for distinguishing deliberate misstatements from deliberate omissions: "[b]y reporting less than a total story, an affiant can manipulate the inferences a magistrate will draw. To allow a magistrate to be misled in such a manner could denude the probable cause requirement of all real meaning."<sup>25</sup> Accordingly, the defendant urged the court to hold that, "if a defendant meets the heavy burden of establishing that an affiant acted with an intent to deceive the magistrate—whether by misstatement or omission—art. 14 requires suppression, without regard to the effect of the misstatement or omission on probable cause."<sup>26</sup> And the defendant argued that individuals should be able to establish the affiant's intent by looking at the totality of the circumstances.<sup>27</sup>

For its part, the Commonwealth responded by focusing almost exclusively upon *Franks* and the Massachusetts decisions that hewed closely to that federal precedent. The Commonwealth argued, among other things, that the trial court had found that the information about the failed identifications did not represent an intent to deceive. Further, in the Commonwealth's view, an omission cannot in any event amount to a constitutional harm because "[a]n affiant has no obligation to include in a search warrant affidavit every exculpatory fact."<sup>28</sup> The Commonwealth maintained that, as under federal law, "[o]missions from a search warrant affidavit only require suppression if inclusion of the omitted facts would have changed the magistrate's determination of probable cause."<sup>29</sup> In this case, as the trial court found, the inclusion of the omitted information would not have changed the magistrate's determination.

As I noted above, the public defender representing Ortiz had asked me to write an amicus brief arguing that the Supreme Judicial Court should take an expansive view of the scope of the *Franks* doctrine under Article 14. She wondered whether anything about the circumstances of the framing of the Massachusetts Constitution of 1780 would support that expansive view in light of the facts of this case. In other words, the defendant's attorney believed the key to independent state constitutional analysis in this instance could only be some unique aspect of Massachusetts constitutional history. Perhaps John Adams and his

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24. See Brief for Defendant, *supra* note 19, at 26.

25. *United States v. Stanert*, 762 F.2d 775, 781 (9th Cir. 1985).

26. Brief for Defendant, *supra* note 19, at 31-32.

27. See *id.* at 32.

28. Brief for Commonwealth of Massachusetts at 25, *Commonwealth v. Ortiz*, No. SJC-10466 (Mass. 2009).

29. *Id.* at 36.

fellow constitution-drafters had some event or series of events in mind when they crafted the protection against unreasonable searches and seizures, which could serve as a legitimate basis for departure from federal law.

Here, then, is the problem with the New Judicial Federalism in practice: as reflected in her request of me, what Ortiz's attorney implicitly believed was that a separate constitutional jurisprudence of search and seizure protections could only be developed out of sources separate and distinct from the federal constitution. On this understanding, independent state constitutionalism is a function of a state constitutional experience, including text and history, which distinguishes it from the federal experience. This makes sense if one begins with the premise that federal doctrine provides a presumptively correct framework for analyzing individual rights issues. Indeed, in *Commonwealth v. Ortiz*, the essential disagreement centered on the way in which the doctrinal test first developed by the U.S. Supreme Court in *Franks* should be applied to the facts. The case was not about the development of a new doctrinal path. Rather, so far as the lawyers and the lower court were concerned, *Franks* and its Massachusetts progeny, like *Nine Hundred Ninety-two Dollars*, provided a doctrinal framework sufficient to resolve the issue at hand. The only real question concerned how the court should apply that doctrinal framework to the facts.

Why did the defendant's attorney in Ortiz begin with an effort to distinguish federal doctrine, rather than argue for a doctrinal framework that would optimally effectuate the state constitutional protection against unreasonable searches and seizures? No doubt her thinking about the case reflected the analysis and approach that Massachusetts state courts have expressly preferred since the Supreme Judicial Court adopted the *Franks* analysis. Accordingly, the question becomes: why has the Massachusetts Supreme Judicial Court, along with many other state high courts, pledged its support of independent state constitutionalism, while at the same time failing to engage in the real, and difficult, work of doctrinal development under state constitutional individual rights provisions?<sup>30</sup>

Many commentators have explored this issue. Bob Williams has long questioned state court reliance upon federal precedent in individual

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30. "Why, in other words, don't state courts treat state constitutions as the independent sources of positive constitutional law that the new theories of state constitutional interpretation deem them to be?" GARDNER, *supra* note 3, at 48. See also Long, *supra* note 1, at 52 (stating that the time has come to "start explaining why [state courts] actually *do not*" give "strong independent interpretations to their state constitutions.").

rights cases.<sup>31</sup> Others have theorized as to why there should be such reliance. Gardner, in his inquiry into what he calls the “failed discourse” of state constitutionalism, contends that the reason why state courts do not engage in state constitutional doctrinal development is because there is nothing unique about the state experience, and that state constitutional interpretation follows from the function of state constitutions in our federalist governmental structure.<sup>32</sup> More recently, Justin Long has suggested that state courts primarily engage in what he calls “intermittent independent state constitutionalism,” ruling in certain cases on state grounds and in others deferring to national standards, an approach he believes normatively desirable.<sup>33</sup>

In the first part of this article, I outline Gardner’s and Long’s theories. I address why those theories do not fully explain the failure of state courts to engage in constitutional doctrinal development—or, perhaps more accurately, that they do not explain why state courts seem content to allow the U.S. Supreme Court to create the doctrine that governs shared textual commitments to individual rights and liberties, like the protections of free expression, privacy, due process of law and equal treatment before the law. I turn in Parts II and III to an explanation for inconsistent independent state constitutionalism that reflects the circumstances of state constitutional rights litigation. I suggest that the lack of independent constitutional analysis does not represent a failure of interest on the part of state courts, or a failure of methodology, character, or culture, but rather is simply the consequence of strong path dependence—that is, of a demonstrable and perhaps inevitable reliance upon federal constitutional doctrinal paths. My effort here is descriptive, to explain both how state constitutionalism is often path dependent, and why the conditions under which state courts operate promote path dependence. In Part IV, I argue that even a constrained independent state constitutionalism has enduring normative value in respect to constitutional discourse about individual rights and liberties, and

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31. See ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* 170 (2009) (critiquing the “notion that interpretations of the federal Constitution can somehow authoritatively set the meaning for similar provisions of state constitutions”).

32. See GARDNER, *supra* note 3, at 18-20.

33. Long, *supra* note 1, at 51-52. Numerous other commentators have pointed out that state courts have not in practice embraced the ethos of independent state constitutionalism. See, e.g., Robert A. Schapiro, *Identity and Interpretation in State Constitutional Law*, 84 VA. L. REV. 389 (1998) (arguing that state courts tend to be deferential to federal constitutional law); Michael Esler, *State Supreme Court Commitment to State Law*, 78 JUDICATURE 25 (1994) (reporting that state courts do not rely upon independent analysis in most instances); John W. Shaw, Comment, *Principled Interpretations of State Constitutional Law—Why Don’t the “Primacy” States Practice What They Preach?*, 54 U. PITT. L. REV. 1019 (1993) (reporting failure of state courts to actually practice independent state constitutionalism).



therefore represents an effort worth the support of academics and lawyers alike.

#### I. THE PROBLEM OF INCONSISTENT INDEPENDENT STATE CONSTITUTIONALISM

James Gardner has described the essential problem with independent state constitutional interpretation of individual rights and liberties provisions:

Notwithstanding a considerable and still-growing literature criticizing the way state courts interpret state constitutions, most state courts today continue to employ the same basic approach: they routinely begin and end their analysis by adopting the rules of decision developed by the U.S. Supreme Court for use under the U.S. Constitution; engage in no meaningfully independent analysis of the state constitution; and offer little in the way of explanation for their actions. From time to time, the bolder of the state courts may reach a result that differs from the one the U.S. Supreme Court has reached under the federal Constitution, but in a way that suggests the result was dictated by the state court's disagreement with the federal outcome.<sup>34</sup> For Gardner, the reason why state courts "routinely begin and end their analysis by adopting the rules of decision developed by the U.S. Supreme Court" is that state constitutions are not like the U.S. Constitution: they have a different role to play in our federalist scheme of government and, accordingly, demand a different interpretive approach than we would employ in respect to the U.S. Constitution.<sup>35</sup>

Gardner correctly notes that the interpretive factors that the proponents of independent state constitutional analysis favor are suspect.<sup>36</sup> Hans Linde, among the most ardent proponents of independent state constitutional interpretation, has urged state courts, when faced with a claim under an individual rights provision of the state constitution, to critically examine the text, as well as history, structure, precedent, and evidence of local character and values, in addition to the pragmatic jurisprudential considerations all judges encounter.<sup>37</sup> But this methodological approach—the so-called primacy approach—is not necessarily easy to follow. Textual variations in individual rights provisions are often slight. Historical experience, as it has affected the shape of constitutional development, is more often shared among citizens

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34. GARDNER, *supra* note 3, at 14.

35. *See id.* at 18-20.

36. *See id.* at 48-49.

37. *See* Hans Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 181-93 (1984).

across state lines, rather than isolated to a particular state. And state constitutional precedent may be nonexistent.<sup>38</sup>

All of which points to a convergence between state constitutional meaning and the understanding of federal law as set forth by the U.S. Supreme Court and the lower federal courts. As Gardner concludes, it should be unsurprising that state court judges “might prefer for pragmatic reasons to dispense with a laborious demonstration of a predictable doctrinal convergence and simply speed things up by adopting federal constitutional law as the presumptive rule of decision under the state constitution.”<sup>39</sup> There can be little doubt, moreover, that most state judges do not engage in the interpretation of state constitutional text in the way Linde prescribes—certainly not in every case.<sup>40</sup>

But what of the argument that differences in the character and values of a state polity justify—and, more importantly for our purposes here, enable—state constitutional interpretation of a specific individual rights provision that diverges from its federal counterpart?<sup>41</sup> In Gardner’s view,

the resort to state character and values has come to occupy a position of disproportionate importance in the methodology of state courts, particularly when they seek to justify decisions construing their state constitutions to provide broader protections than does the U.S. Constitution for commonplace individual rights such as the freedoms of speech and privacy and the freedom from unreasonable searches and seizures.<sup>42</sup>

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38. See GARDNER, *supra* note 3, at 49-50. See also Long, *supra* note 1, at 66 (observing that “[s]tate constitutionalism is hard work; not only are the relevant secondary sources frequently difficult to come by or to interpret, but there is commonly little instructive precedent to guide the court.”); Hans A. Linde, *First Things First: Rediscovering the States’ Bills of Rights*, 9 U. BALT. L. REV. 379, 392 (1980) (stating that “to make an independent argument under the state [constitution] takes homework.”).

39. GARDNER, *supra* note 3, at 50.

40. See *infra* notes 59-62 and accompanying text (discussing results of one-year study by Justin Long of Oregon, Washington, New Jersey and New Hampshire state constitutional decisions).

41. See, e.g., Jeffrey S. Sutton, *Why Teach—and Why Study—State Constitutional Law*, 34 OKLA. CITY U. L. REV. 165, 174-75 (2009) (arguing that state courts may use “local conditions and traditions to affect their interpretation of a constitutional guarantee” and “fifty constitutions” may be interpreted “differently to account for . . . differences in culture, geography and history”); Margaret H. Marshall, “Wise Parents Do Not Hesitate to Learn from Their Children”: *Interpreting State Constitutions in an Age of Global Jurisprudence*, 79 N.Y.U. L. REV. 1633, 1641 (2004) (arguing that state constitution should be viewed as “the product of the democratic aspirations of people united by a highly localized culture and history”).

42. GARDNER, *supra* note 3, at 55.

Gardner calls this move a resort to an implausible “Romantic subnationalism.”<sup>43</sup> It is implausible because, as he notes, internal diversity, as well as transportation and communication technology, among other factors, “have made state boundaries extremely porous—indeed, for many purposes, such boundaries have become irrelevant.”<sup>44</sup> At its core, Romantic subnationalism does not provide “a contextually plausible account of state identity that comports with socially and empirically sustainable descriptions of contemporary American life,” and it therefore “cannot sustain a plausible methodology of state constitutional interpretation.”<sup>45</sup> There is no true independent state constitutionalism based upon a state’s unique character and values, Gardner maintains, because such character and values do not really exist.<sup>46</sup>

Justin Long has also examined the problem with independent state constitutionalism. Canvassing some of the same territory as Gardner,<sup>47</sup> he reaches many similar conclusions. In his view, unique state character or values cannot provide the basis for a vibrant independent state constitutionalism, because the differences in character or values between one state and another, or one state and the nation—even when such matters are discoverable—are relatively rare.<sup>48</sup> Further, these rare differences cannot provide a principled basis for constitutional decisionmaking if taken to their logical conclusion; he asks, for instance, “if ‘the people’ of West Virginia value their privacy more than most, such that a police search of a car is unreasonable, does that imply that the West Virginia character would also rebel at a registry of sex offenders?”<sup>49</sup>

As for enhanced protection of individual rights as a justification for independent state constitutionalism, Long points out that this is just not a basis upon which conservative judges are likely to pursue an independent state constitutional analysis.<sup>50</sup> Neither is the argument that state courts should engage in independent state constitutional analysis in order to promote dialogue with federal courts about the meaning of shared

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43. *Id.* at 56.

44. *Id.* at 69.

45. *Id.* at 79.

46. See, e.g., James A. Gardner, *Southern Character, Confederate Nationalism, and the Interpretation of State Constitutions: A Case Study in Constitutional Argument*, 76 TEX. L. REV. 1219, 1227 (1998) (concluding as a practical matter “that any differences between Southerners and other Americans have no significant ramifications for the interpretation of Southern constitutions”).

47. See Long, *supra* note 1, at 58-68.

48. See *id.* at 59-62.

49. *Id.* at 61.

50. See *id.* at 62-64.

constitutional commitments. A court is likely to worry that independent decisionmaking based upon the state constitution may run the risk of appearing illegitimate to the people—that is, of seeming to revolve around the rejection of federal precedent for its own sake.<sup>51</sup> Further, Long contends that these efforts tend to be rather hollow at the core; he doubts any “consensus on ‘American constitutionalism’ will ever be found, no matter how well-reasoned the state courts are in their rebuke of contemporary Federal Supreme Court decisions.”<sup>52</sup>

Another reason why state courts have not embraced the New Judicial Federalism, Long maintains, may be the influence of American exceptionalism—that is, the belief that “the United States Constitution and system of government are the best in the world, and that adherence to alternative sources of law risks debasing our national liberty.”<sup>53</sup> Translated into the work of state courts, Long posits that, to the extent state judges “feel that the United States legal tradition is unique and valuable, they may privilege it over competing sources of legal authority—even from their own states.”<sup>54</sup> He continues:

State judges’ patriotic devotion to American national law, coupled with the common juristic unease with structural reform, suggest that state constitutionalism may appear as an insidious threat to the “normal,” i.e. federal, way of doing things. If the “American” (legal) way of life is the best in the world, a state judge might wonder how can that way be improved by application of independent state constitutionalism?<sup>55</sup>

Thus, state court judges could view American exceptionalism as a factor that inhibits inclinations toward independent state constitutionalism.<sup>56</sup>

For Long, the effort to persuade state courts to engage in independent state constitutional analysis consistently on the basis of any of the arguments in favor of the practice is ultimately futile. He supports this conclusion with an empirical review of a year’s worth of state constitutional decisions in four states which historically have claimed to favor independent constitutional decision-making: Oregon, Washington, New Jersey, and New Hampshire.<sup>57</sup> His review reveals that even courts in these states do not engage in independent state constitutional analyses in every case; rather, they do so intermittently, “lead[ing] to

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51. *See id.* at 65-66.

52. *Id.* at 67-68.

53. Long, *supra* note 1, at 68-69.

54. *Id.* at 69.

55. *Id.* at 71.

56. *See id.* at 72.

57. *See id.* at 72-73.

unpredictability for litigants and cast[ing] into doubt the idea that any state court will give its constitution unflagging interpretive attention.”<sup>58</sup>

For example, Long finds that, while the Oregon Supreme Court adverted to the importance of state constitutional analysis and attempted the same in most instances, it abandoned that effort almost entirely in at least four cases involving criminal procedure issues.<sup>59</sup> Long speculates that “the court simply chose to save itself some time and energy in reaching the conclusion it had already deemed appropriate,” which in each case mirrored the analysis and result that would have obtained under the federal constitution.<sup>60</sup> In New Jersey, meanwhile, the Supreme Court failed to engage in independent state constitutional analysis in one-third of the cases raising state constitutional issues,<sup>61</sup> while in New Hampshire the Supreme Court did not substantively differentiate its state and federal constitutional analyses in cases involving double jeopardy and due process challenges.<sup>62</sup>

Long’s explanation for these and like results is that state courts are, and should be, in the business of practicing intermittent state constitutionalism.<sup>63</sup> On this theory, state courts are engaged in making a conscious choice whether to resolve a particular individual rights issue under the state or federal constitution. When a state court treats an issue as a matter of state law, “the court expresses a conviction that the matter should be decided internally, according to the state’s own methods and traditions.”<sup>64</sup> In these cases, he continues, “the court is putting the state forward as a coherent and potent legal community—not a constitutionally significant authoring community, but an interpretive community.”<sup>65</sup> He sees a series of autonomous state constitutional decisions as serving to identify areas in which the state community will “turn[] to itself to solve certain social dilemmas.”<sup>66</sup>

To the extent state courts are choosing which issues may best be addressed by the state community, they are making a judgment about issues that they deem national and which, therefore, “should be decided

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58. *Id.* at 73.

59. *Id.* at 75-76.

60. *Id.* at 77.

61. *Id.* at 82.

62. *See id.* at 85-86.

63. *Id.* at 87.

64. *Id.* at 89.

65. *See id.* at 89-90.

66. *Id.* at 91. *See also id.* at 95-96 (concluding that “a strongly independent state constitutional analysis stakes out the area as a matter for the state community”); *id.* at 102 (“Even when practices only intermittently, state constitutionalism can be effective at teasing out and bolstering the strands of culture that center on the state as a community.”).

by the national community.”<sup>67</sup> He considers the example of the Oregon cases from 1996 that address, at least in part, the scope of the exclusionary rule under the state parallel to the Fourth Amendment. “By treating the issue as a matter of national law,” he reasons, “the state court implicitly adopted the view that a single, national rule should apply and that law enforcement officials should not have to conduct themselves according to different exclusionary rules in state and federal courts.”<sup>68</sup>

Much of the theorizing put forth by Gardner and Long could explain the failure of state courts consistently to engage in independent state constitutional interpretation. Gardner is surely correct that “Romantic subnationalism” is more myth than reality and, accordingly, that recourse to general notions of public culture and values cannot provide a firm foundation for judicial decisionmaking. For Gardner, inconsistent state constitutionalism is the logical result of a federalist system in which state constitutions are merely the vehicles through which states may resist federal constitutional decisionmaking. And Long, for his part, believes that the inconsistency in state constitutional interpretation of individual rights provisions may well reflect considered and essentially strategic determinations by state courts about which matters should be decided as a matter of state law and which should be decided as a matter of federal law.

Still, as plausible as these theories may be, it’s not clear that, after decades of advocacy by attorneys and state constitutional advocates, either Gardner’s or Long’s account satisfactorily explains why state courts practice independent state constitutionalism so inconsistently. State courts only infrequently choose to explain the mechanics of their constitutional decisionmaking. Consequently, in many instances, we don’t know whether reliance upon the federal framework reflects, for example, the belief that the case does not provide an appropriate opportunity to resist the federal understanding of a particular right or interest, or the determination that the issue at hand is one particularly suited for national as opposed to state resolution.

Indeed, it is possible that a state court had no larger theoretical considerations in mind when it set about to resolve a dispute about the meaning of a state constitutional individual rights provision in a particular case. Rather, it might have been the case that the members of the court, though capable of undertaking an independent inquiry into the meaning of the state constitutional text and the best way in which to effectuate that meaning, nonetheless were essentially constrained from doing so, constrained in such a way that they instead focused their

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67. *Id.* at 97.

68. *Id.* at 98.

attention upon a different inquiry—namely, whether and how to adopt a federal doctrinal framework into state law.<sup>69</sup>

Let's take a step back. State constitutions are connected to the federal constitution in various ways, not least through a generally similar structural design, with powers allocated among governmental entities and institutions limited by commitments to the protection of individual rights and liberties.<sup>70</sup> Notwithstanding these connections, it remains that each state constitution articulates a state's own organic scheme of governance, including its commitments to the protection of individual rights and liberties. In this sense, at least, the state constitution is functionally distinct from the federal constitution. And the responsibility for explicating the meaning of the state constitution as a scheme of governance ultimately falls not to the federal courts, but to the state's highest court.<sup>71</sup> After all, as Bob Williams has noted, state constitutions are law,<sup>72</sup> and state high court judges owe it to the litigants before them and the citizens they serve to say just what the law is.<sup>73</sup>

Here is where the constraints on a state court's interpretive choices become relevant. In the process of saying what the law is when a state court considers the meaning of a constitutional provision that is textually or structurally similar—or, more likely, identical—to a provision of the Bill of Rights, the work of the U.S. Supreme Court looms large.<sup>74</sup> Indeed, it looms exceedingly large. Over the past century, the U.S. Supreme Court has contributed so much to the development of individual rights doctrine in so many areas—free expression, due process, equal

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69. Or, it might have been the case that, given turnover in the membership of the court, interest in independent state constitutional analysis has waned. I thank Bob Williams for reminding me of this possibility.

70. Of course, state constitutions are far from carbon copies of the federal constitution. See, e.g., Michael E. Libonati, *State Constitutions and Legislative Process: The Road Not Taken*, 89 B.U. L. REV. 863, 866 (2009) (observing that, in respect to lawmaking procedures, "[m]ost state constitutions do not follow the federal model").

71. See Rex Armstrong, *State Court Federalism*, 30 VAL. U.L. REV. 493, 495 (1996) (discussing obligation of state supreme court to interpret state constitution).

72. See WILLIAMS, *supra* note 31, at 3 (discussing state constitution as "a charter of law and government for the state"); see also Jack L. Landau, *Some Thoughts About State Constitutional Interpretation*, 115 PENN. ST. L. REV. (forthcoming 2011) (noting that state constitutions "perform the function that we expect of constitutions: they constitute"); Lawrence Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism*, 28 HASTINGS CONST. L.Q. 93, 100-01 (2000) (discussing state court authority to interpret state constitution).

73. See Lawrence Friedman, *Reactive and Incompletely Theorized State Constitutional Decision-making*, 77 MISS. L.J. 265, 301-03 (2007) (discussing state court obligation to provide guidance).

74. See, e.g., Schapiro, *supra* note 33, at 290-91 (discussing state court reliance upon federal reasoning and results); Esler, *supra* note 33, at 28-32 (same). Bob Williams has described the U.S. Supreme Court's individual rights jurisprudence as exerting an "overwhelming gravitational pull." WILLIAMS, *supra* note 31, at 185.

protection, the right to be free from unreasonable searches and seizures, to name a few—that the real possibility of developing a novel doctrinal approach may appear daunting to a state court, if not entirely out of reach. The possibility of innovation might appear still more remote if the court lacks sufficient resources to devote to the task.

Accordingly, the failure of state courts consistently to engage in independent state constitutional interpretation may reflect not the limitations of state constitutions themselves, as Gardner suggests, or even the belief that some constitutional issues are local and others national, as Long proposes. Rather, it may be that state courts perceive the cost of engaging in independent state constitutional analysis—of engaging in independent doctrinal development—simply to be extremely high. They may see the cost as so high, in fact, that they are not likely to make the effort to figure out a different way to understand and to apply their state constitution's protections of, say, free expression, due process, equal protection, or the right to be free from unreasonable searches and seizures. If the cost of actually engaging the machinery of doctrine-development in respect to a particular individual right is higher than the conceivable returns on that investment of time and energy, we should not be surprised when state constitutional decisions are essentially path dependent. Before turning to the nature of the resource constraints on state courts that lead to path dependence, I discuss in the next Part the theory of path dependence generally and illustrate the hold of path dependence on state constitutional individual rights implementation.

## II. PATH DEPENDENT STATE CONSTITUTIONALISM

For all practical purposes, independent state constitutionalism did not exist before the 1970s. As James Gardner has explained, several factors account for the state constitutionalism's late development. First, he points to the tradition of constitutional universalism, which “may have predisposed state courts to approach state constitutions under the assumption that state and federal constitutional law were essentially identical, even interchangeable.”<sup>75</sup> The judicial protection of individual rights and liberties, moreover, is a relatively recent phenomenon, traceable to the efforts of the Warren court and the rights revolution of the 1960s.<sup>76</sup> As noted above, the situation began to change following Brennan's *Harvard Law Review* article and the frustration some lawyers

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75. GARDNER, *supra* note 3, at 37. See also Jason Mazzone, *The Bill of Rights in the Early State Courts*, 92 MINN. L. REV. 1 (2007) (discussing application of federal individual rights protections in early state courts).

76. See GARDNER, *supra* note 3, at 37.



and judges may have felt as the Warren Court's federal rights revolution came to an end.<sup>77</sup>

Independent state constitutionalism in the area of individual rights and liberties came of age in the late 1970s. Bob Williams has recounted the efforts of state courts at that time to consider their state constitutions as sources of individual rights protections.<sup>78</sup> The first stage of the evolution of independent state constitutionalism was marked, as Williams puts it, by the "thrill of discovery."<sup>79</sup> The second stage featured a backlash against independent state constitutional interpretation, fueled by the perception that the movement focused on results more than analysis. It was during this stage that state courts began to develop criteria "to guide and limit . . . their decision about whether to interpret their state constitutions to provide more rights than were guaranteed at the federal level."<sup>80</sup> The third stage, according to Williams, has centered on what he has called "the long hard task" of developing interpretive approaches to state constitutions.<sup>81</sup>

Despite consistent state constitutional advocacy from jurists and commentators alike,<sup>82</sup> the task has proved longer and harder than the advocates of independent state constitutionalism might have imagined. Why has the independent state constitutionalism movement not truly flourished? As discussed above,<sup>83</sup> commentators like Gardner and Long have their hypotheses, and in this Part, I explore another, arguing that the answer may lie in path dependence. Path dependence is a function of the external constraints acting on the ability of state courts to engage in independent state constitutional analysis. First, I discuss the dimensions of the doctrine of economic path dependence as it can be applied to judicial decisionmaking. Next, I address the path dependent nature of doctrinal development and application of state constitutional doctrine in the area of individual rights jurisprudence. Then, in Part III, I turn to the external constraints that have led to such strong path dependence, and whether those constraints can be overcome.

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77. See *supra* note 1 and accompanying text (discussing Justice Brennan's advocacy of state constitutionalism).

78. Robert F. Williams, *Introduction: The Third Stage of the New Judicial Federalism*, 59 N.Y.U. ANN. SURV. AM. L. 211, 211-12 (2003).

79. *Id.* at 214.

80. *Id.* at 218.

81. *Id.* at 219.

82. See, e.g., *State v. Bradberry*, 522 A.2d 1380, 1389 (N.H. 1986) (Souter, J., concurring) (observing that, if the court places "too much reliance on federal precedent, [the court] will render the State rules a mere row of shadows").

83. See *supra* notes 34-68 and accompanying text (discussing Gardner's and Long's theories explaining inconsistent independent state constitutionalism).

### A. *Path Dependence*

The doctrine of path dependence is premised upon the idea that what we experience today is a product of what we have done in the past—not just that “history matters,”<sup>84</sup> but that “it is sometimes not possible to uncover the logic (or illogic) of the world around us except by understanding how it got that way.”<sup>85</sup> In general, path dependence theory holds that, once we make the initial decision to pursue a certain path, subsequent decisions necessarily reflect and may perpetuate that initial decision, with the result that it may later prove difficult to change direction.<sup>86</sup> Eventually, we will become “locked-in” to our initial decision.<sup>87</sup> At this point, it becomes unlikely that we can change paths—even if [we] are locked in on a path that has a lower payoff than an alternate one.”<sup>88</sup>

Naturally, the concept of path dependence is more complex than this description suggests. Scholars in a wide array of disciplines have explored in great detail the different and nuanced understandings of path dependence that might be applied to a variety of events and circumstances.<sup>89</sup> For purposes of our inquiry into independent state constitutionalism, the basic economics understanding of path dependence should suffice.<sup>90</sup> As Paul David explained in his work on the dominance of the QWERTY keyboard configuration, path dependence refers to the

84. Stephen E. Margolis & S.J. Liebowitz, *Path Dependence*, in 3 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 17, 17 (Peter Newman ed., 1998). See also Raghu Garud & Peter Karnøe, *Path Creation as a Process of Mindful Deviation*, in PATH DEPENDENCE AND CREATION 1, 1 (Raghu Garud & Peter Karnøe eds., 2001) (noting that “[o]ur present and future choices are conditioned by choices we have made in the past.”).

85. Paul A. David, *Clio and the Economics of QWERTY*, 75 AM. ECON. REV. 332, 332 (1985).

86. See David Wilsford, *Path Dependency, or Why History Makes It Difficult but Not Impossible to Reform Health Care Systems in a Big Way*, 14 J. PUB. POL’Y 251, 252 (1994).

87. Margolis & Liebowitz, *supra* note 84, at 17.

88. Atul Gawande, *Getting There from Here: How should Obama reform health care?*, THE NEW YORKER, Jan. 26, 2009, at 26, 30.

89. See Paul M. Hirsch and James Gillespie, *Unpacking Path Dependence: Differential Valuations Accorded History Across Disciplines*, in Garud & Peter Karnøe, *supra* note 84, at 69, 74-81 (discussing application of path dependence theories to anthropology, economics, history, management, and political science). See also Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 606-22 (2001) (discussing the appearance in law of increasing returns path dependence, evolutionary path dependence, and sequencing path dependence); Kent D. Schenkel, *Exposing the Hocus Pocus of Trusts*, 45 AKRON L. REV. (forthcoming 2012) (discussing path dependent aspects of law of trusts).

90. As Clayton P. Gillette put it, “[m]y argument here is more from analogy than an effort to apply the underlying literature explicitly.” Clayton P. Gillette, *Lock-in Effects in Law and Norms*, 78 B.U. L. REV. 813, 816 (1998).

influence on eventual economic outcomes by “temporally remote events, including happenings dominated by chance elements rather than systematic forces.”<sup>91</sup>

Path dependence arises when a decisionmaker chooses to pursue a particular path. “The selection of a prior path, for whatever reason, determines current behavior.”<sup>92</sup> Which path a decisionmaker selects depends, to an extent, upon how many users are in a particular network, as the value of participating increases with the number of people who join that network. This in turn increases the value of the most popular path—a popularity that of course may be unrelated to efficiency.<sup>93</sup> In the world of manufacturing standards, this phenomenon can lead to the lock-in of an inefficient technology because manufacturers will be averse to producing a new technology when a large number of individuals have adopted the old technology.<sup>94</sup> At the same time, the prevalence of that old technology keeps those individuals who must choose a technology from adopting something different.<sup>95</sup>

The classic example of this kind of adoption and lock-in is the QWERTY typewriter keyboard. In the 1870s, the typewriter was on the verge of widespread commercial use, but it suffered from a serious hardware defect: the keys would jam and repeatedly imprint the same letter if struck too quickly.<sup>96</sup> When E. Remington and Sons sought to fine-tune the keyboard design to decrease the frequency of jams caused by typebars, they settled on a new arrangement closely resembling QWERTY. Typewriter technology continued to change throughout the 1870s, and new advances in hardware engineering displaced the use of the typebars that caused the typewriter’s jamming defect. By the 1880s, manufacturers had begun to experiment with more efficient keyboard layouts rivaling QWERTY, some of which increased typing speed by twenty to forty percent. But in the 1890s, a front-stroke machine was developed; called “the Universal,” it employed a QWERTY keyboard.<sup>97</sup>

From that point forward, manufacturers essentially abandoned other layouts. QWERTY’s “lock-in” resulted from the advent of touch-typing and three features of the evolving typewriter production system: “technical interrelatedness, economies of scale, and quasi-irreversibility

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91. David, *supra* note 85, at 332.

92. Gillette, *supra* note 90, at 813.

93. Austan Goolsbee & Peter J. Klenow, *Evidence on Learning and Network Externalities in the Diffusion of Home Computers*, 45 J.L. & ECON. 317, 320 (2002).

94. See Gillette, *supra* note 90, at 817-18 (noting that “[s]tandards solve coordination problems, allowing parties within an industry or users of a technology to interact in ways that would not be possible if actors used variants of the standard”).

95. Goolsbee & Klenow, *supra* note 93, at 320; Gillette, *supra* note 90, at 818.

96. See David, *supra* note 85, at 333.

97. See *id.* at 334.

of investment.”<sup>98</sup> The technical interrelatedness derived from the connection between keyboard “hardware”—that is, the physical keyboard layout—and “software,” as “represented by the touch typist’s memory of a particular arrangement of the keys.”<sup>99</sup> At the turn of the century, when the Universal became popular, employers did not offer to train their typists but expected them to be externally trained. Accordingly, as more businesses purchased QWERTY machines, typists elected to learn QWERTY to increase their marketability. The increase in QWERTY adoptions in industry led to an overall decrease in costs to typists (and other typewriter users who knew how to touch-type), until it no longer made any sense for a business to invest in a non-QWERTY typewriter system.<sup>100</sup>

These economies of scale doomed non-QWERTY typewriter configurations. As more businesses chose the Universal machine, touch typists without personal preference would choose to learn the QWERTY typing method, even though they had the option to choose other methods.<sup>101</sup> While touch typists had the independent option to choose their training, they continued to choose the QWERTY method, simply because they saw that method become increasingly profitable as more people elected to learn it.<sup>102</sup> Eventually, by the mid-1890s, QWERTY became locked-in due to “the high costs of software ‘conversion’ and the resulting quasi-irreversibility of investments in specific touch-typing skills.”<sup>103</sup> By this point in time, hardware conversion became easier and software conversion more difficult. Typewriter hardware was free from the QWERTY keyboard arrangement following the resolution of the jamming defect, but as non-QWERTY manufacturers saw the numbers of QWERTY-programmed typists increase, they moved to convert their hardware to QWERTY to take advantage of the growing supply of available typists.<sup>104</sup>

Though challengers periodically have appeared,<sup>105</sup> and notwithstanding our migration from typewriters to word processors to personal computers to hand-held tablet computers, the QWERTY arrangement remains dominant today. Indeed, it would be prohibitively costly at this point for any business to employ a non-QWERTY

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98. *Id.*

99. *Id.*

100. *Id.* at 335.

101. *Id.*

102. *Id.* at 335.

103. *Id.* at 336.

104. *Id.*

105. See *id.* at 332 (discussing keyboard arrangement patented by Dvorak and Dealey, the Dvorak Simplified Keyboard (DSK)).

system.<sup>106</sup> This is true despite the fact that there are more efficient keyboard layouts than QWERTY, which would likely yield greater returns—at a minimum, a measurable increase in typing speed, which would in turn increase efficiency.<sup>107</sup>

Typewriter manufacturing is one thing, the law another. In her groundbreaking work, “Path Dependence in the Law,” Oona Hathaway applied various models of path dependence to legal decisionmaking, arguing that the choice to follow “precedent,” though an essentially flexible concept within the confines of a particular case, nonetheless represents an initial piece of decision-making that sets at least a rough path for future decisions.<sup>108</sup> When a court adheres to a precedent, it is perpetuating the path chosen by the court that decided that earlier case—the case that set the direction for the course of future decisions.<sup>109</sup> In this way, the common law system works by “gradual[ly] building . . . legal rules upon one another over time.”<sup>110</sup> Following a rule perpetuates further adherence to the rule.<sup>111</sup> And lawyers’ arguments reinforce a path of legal decision-making, as they rarely stray far from established precedent.<sup>112</sup> Rather, litigants prefer to center their positions on pre-existing legal rules and standards, however ultimately inefficient they may be.<sup>113</sup>

Hathaway cites the example of *United States v. Carolene Products Co.*<sup>114</sup> A single footnote from that opinion “set the stage for the Warren Court’s assumption of an active role in monitoring the political institutions of the country,” by suggesting that the Court “would apply different degrees of judicial scrutiny to different types of legislation.”<sup>115</sup> For instance, the Court in that footnote stated that it would be inclined to apply stricter scrutiny to “legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation.”<sup>116</sup> As Hathaway observes, the Supreme Court

106. *Id.* at 336.

107. *See id.* at 332 (noting devotees of the DSK system “have long held most of the world’s records for speed typing”).

108. Hathaway, *supra* note 89, at 624. Other commentators have used path dependence models to explain various features of legal decisionmaking, including legislative lawmaking under state constitutions. *See* Libonati, *supra* note 70, at 867 (noting that constitutional procedural constraints will “entrench[] the path-dependent result of yesterday’s controversies”).

109. *See* Hathaway, *supra* note 89, at 627-28.

110. *Id.* at 627.

111. *See id.* at 628.

112. *See id.*

113. *See id.* at 632.

114. *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938).

115. Hathaway, *supra* note 89, at 630.

116. *Carolene Prods.*, 304 U.S. at 152 n.4.

has devoted much time and attention in the ensuing decades “to expanding and specifying the extent to which this suggestion would be implemented.”<sup>117</sup> From that footnote has evolved an elaborate doctrinal framework for addressing claims raised under the due process and equal protection clauses of the federal constitution. The federal courts are committed to that framework, of course, and it seems that state courts cannot readily disregard the attractiveness and persistence of that and like doctrinal paths when addressing individual rights claims under their state constitutions, as I show in the next section.<sup>118</sup>

### *B. Path Dependence and State Constitutional Doctrine*

My goal in this section is to illustrate, through a few discrete examples, the extent to which state courts, when interpreting their own constitutions, rely upon doctrinal paths blazed and burnished by the U.S. Supreme Court. The QWERTY experience remains an exemplar. The decisionmaker here is the state court, analogous to the typewriter manufacturer facing a choice about how to configure its hardware to ensure optimal utility going forward. The state constitutional provision protecting an individual right or liberty, and the constitution of which it is a part, are the hardware that the state court is committed to making optimally useful through appropriate judicial interpretation and enforcement. In a state constitutional case of first impression, the choice the court has to make concerns the method by which it will implement the constitution.

The method of implementing a constitution is what lawyers call “doctrine.” Doctrine is the lifeblood of constitutional law. In the federal context, Charles Fried has explained, “[t]he rules and principles that emerge” from U.S. Supreme Court decisions, lower federal court decisions, “the practices and pronouncements” of legislatures and executive branches, and the work of constitutional scholars, “are what is compendiously called constitutional doctrine.”<sup>119</sup> Evidenced by all these authoritative sources, doctrine is the mediating field within which the

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117. Hathaway, *supra* note 89, at 630.

118. The hold of such doctrinal paths may also explain state constitutional frameworks in other areas, like separation of powers, in which it is more surprising to find state court reliance on federal doctrine, given the different features and institutions of state governance. Cf. Lawrence Friedman, *Unexamined Reliance on Federal Precedent in State Constitutional Interpretation: The Potential Intra-State Effect*, 33 RUTGERS L.J. 1031, 1031 (2002) (arguing that, in separation of powers cases, “the unexamined adoption of federal standards into state law may lead to the establishment of analytical frameworks that . . . ultimately are ill-suited to addressing questions about institutional arrangements under a differing constitutional structure”).

119. CHARLES FRIED, SAYING WHAT THE LAW IS: THE CONSTITUTION IN THE SUPREME COURT 1 (2004).

meaning of constitutional commands and commitments is realized. It is, in short, the way in which courts make those commands and commitments operationally useful.

This understanding of doctrine informs our belief as to just what it is that we want from independent state constitutionalism. What we would like is for state courts, when considering a state constitutional individual rights provision, to undertake an inquiry into the meaning of the provision and then to shape a suitable doctrine with which to implement it.<sup>120</sup> Accordingly, when we talk about the promise of independent state constitutionalism, we are really talking about the hope that, however the state court articulates the meaning of an individual right or liberty, it will develop a specific doctrinal approach to effectuate that right or liberty. The approach should appropriately respect the constitutional values at stake and the need for courts to resolve issues implicating those values with a certain amount of consistency. The state court's approach does not have to be unique, of course—it may well be that the state court will conclude the doctrine developed by the U.S. Supreme Court provides the optimally effective framework. But it is not unreasonable to expect that, regardless of where it ends up, the state court's approach will reflect a real effort to interpret and apply state constitutional commands regarding individual rights.<sup>121</sup> As Williams has put it, “[a] state high court has the duty, in interpreting the supreme law of the state, to adopt a reasoned interpretation of its own constitution.”<sup>122</sup>

State courts only rarely embrace this duty. Experience shows that a state court is likely, more often than not, to rely upon a doctrinal framework developed by the federal courts (though of course it may not apply that framework in quite the same way).<sup>123</sup> As the cases discussed

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120. See RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 38 (2001) (discussing what it means for a court to implement a constitutional command).

121. See Lawrence Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism*, 28 HASTINGS CONST. L.Q. 93, 137 (2000) (arguing that state courts should endeavor “to make good constitutional law, using accepted constitutional argument” rather than “unique constitutional law”) (emphasis added).

122. WILLIAMS, *supra* note 31, at 171; see also Thomas Morawetz, *Deviation and Autonomy: The Jurisprudence of Interpretation in State Constitutional Law*, 26 CONN. L. REV. 635, 657 (1994) (observing that, “from the standpoint of interpretive responsibility,” state courts should provide “a compelling account” of the state constitution, “an account that may or may not dovetail with the federal understanding”).

123. I am referring here to parallel individual rights protections in state and federal constitutions—those provisions that are textually identical or similar. See WILLIAMS, *supra* note 31, at 115-16 (discussing six different kinds of state constitutional rights provisions). The state courts have developed novel doctrinal approaches in interpreting rights provisions that have no federal cognate, like the right to an adequate education under the Massachusetts Constitution. See *Hancock v. Comm’r of Educ.*, 822 N.E.2d 1134 (Mass. 2005) (Marshall, C.J., concurring) (plurality opinion) (addressing individual right to education as requiring inquiry into sufficiency of state action rather than as

below demonstrate, the path first established by the U.S. Supreme Court exhibits a powerful hold on both the development and application of constitutional doctrine by state courts resolving individual rights challenges under state constitutions.

### 1. The Exclusionary Rule and the New Hampshire Constitution

Criminal cases are fertile ground for state constitutional claims. The defense bar has been adept at pressing arguments that state constitutional protections are more expansive than their federal counterparts under the Fourth, Fifth and Sixth Amendments.<sup>124</sup> One area within criminal procedure in which many state courts have sought to depart from the U.S. Supreme Court's approach is in the application of the exclusionary rule. The federal exclusionary rule requires that, when a court concludes that a search or seizure violated the Fourth Amendment's doctrinal rules, any evidence obtained as a result must be excluded from trial. The U.S. Supreme Court adopted the exclusionary rule almost a century ago, in *Weeks v. United States*.<sup>125</sup> That Court understood the exclusionary rule to be a necessary corollary to the prohibition against unreasonable searches and seizures by agents of the federal government, for without it that protection would be meaningless.<sup>126</sup>

The Supreme Court began its retreat from this understanding of the exclusionary rule in *United States v. Calandra*,<sup>127</sup> in 1974, in which it concluded that the rule does not serve to remedy the privacy injury suffered by the victim of an illegal search; rather, "the rule's prime purpose is to deter future unlawful police conduct."<sup>128</sup> Rather than being a necessary corollary to the protection against unreasonable searches and seizures, then, the rule, as a matter of judicial policy, should not be extended in cases in which any additional deterrent effect would be

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deprivation of fundamental interest). Of course, in this area, too, there is convergence. See Scott R. Bauries, *State Constitutions and Individual Rights: Conceptual Convergence in School Finance Litigation*, 18 GEO. MASON L. REV. 301, 352 (2011).

124. See, e.g., Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141, 1148-51 (1985) (discussing state court opportunities to address criminal issues).

125. *Weeks v. United States*, 232 U.S. 383 (1914). The Court later extended the exclusionary rule's reach to include agents of state government in *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (holding that "all evidence obtained by searches and seizures in violation of the Constitution is . . . inadmissible in a state court").

126. See *Weeks*, 232 U.S. at 393-94.

127. *United States v. Calandra*, 414 U.S. 338 (1974).

128. *Id.* at 347.



uncertain.<sup>129</sup> *Calandra* led to *United States v. Leon*,<sup>130</sup> decided in 1984, in which the Court held that, in view of the rule's deterrent purpose, it should not apply in instances in which police executed a search in good faith reliance upon a warrant that later proved to be defective.<sup>131</sup> This is the federal path, a path that has led the Court time and again to consider the exclusionary rule's potential to deter government misconduct when determining whether the rule is applicable.<sup>132</sup>

The New Hampshire Supreme Court is one of many state courts that have attempted to analyze the adoption of a good faith exception to the exclusionary rule independently, as a matter of state law, and without purporting to rely upon federal case law as dispositive.<sup>133</sup> For several decades, the New Hampshire high court has prided itself on its commitment to independent state constitutional interpretation. As Long has noted, the court has held that it will endeavor to give "independent meaning to its state constitution first and foremost," and "customarily add[s] boilerplate language to its constitutional decisions specifying that it reaches the state constitution first and cites federal precedent, if at all, merely for its persuasive power."<sup>134</sup>

In *State v. Canelo*,<sup>135</sup> the court began its consideration of whether the New Hampshire Constitution permits a good faith exception to the exclusionary rule with a review of the history of the state constitutional protection against unreasonable searches and seizures.<sup>136</sup> Part I, Article 19 of the New Hampshire Constitution, like the provision of the Massachusetts Constitution from which it was taken, is textually similar but not precisely identical to the Fourth Amendment, though the New Hampshire Court has not attempted to articulate a distinctive jurisprudence on that basis.<sup>137</sup> The court concluded in *Canelo* that Part I, Article 19 "manifests a preference for privacy over the level of law enforcement efficiency which could be achieved if police were permitted

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129. See *id.* at 351 (concluding application of the exclusionary rule would have no deterrent effect in the context of a grand jury proceeding).

130. *United States v. Leon*, 468 U.S. 897 (1984).

131. See *id.* at 922.

132. See, e.g., *Arizona v. Evans*, 514 U.S. 1 (1995) (declining to apply exclusionary rule when police relied in good faith upon erroneous computer records).

133. See Matthew A. Nelson, Note, *An Appeal in Good Faith: Does the Leon Good Faith Exception to the Exclusionary Rule Apply in West Virginia?*, 105 W. VA. L. REV. 719, 748-51 (2003) (discussing state court rejections of good faith exception under state law through 2002).

134. Long, *supra* note 1, at 84.

135. *State v. Canelo*, 653 A.2d 1097 (N.H. 1995).

136. See *id.* at 1103-04.

137. See GARDNER, *supra* note 3, at 7 (discussing the Massachusetts and federal search and seizure protections).

to search without probable cause or judicial authorization.”<sup>138</sup> The court saw enforcement of the rule as placing

the parties in the position they would have been in had there been . . . no violation of the defendant’s constitutional right to be free of searches [and seizures] made pursuant to warrants issued without probable cause. In doing so, the rule also preserves the integrity of the judiciary and the warrant issuing process.<sup>139</sup>

Importantly, the *Canelo* court did not actually develop a new doctrinal approach to implementing the protection against unreasonable searches and seizures. Rather, the court simply declined to adopt the good faith exception to the exclusionary rule as a part of New Hampshire law. For all intents and purposes, *Canelo* signaled that the exclusionary rule under New Hampshire law would function the way it had under federal law before the Supreme Court declared deterrence to be the exclusive aim of the rule. The only doctrinally relevant distinction the New Hampshire court drew related to the rationale for the exclusionary rule: where the U.S. Supreme Court saw deterrence as the rule’s animating principle, the New Hampshire Supreme Court saw a connection to the state constitutional “preference for privacy,”<sup>140</sup> suggesting that the rule would continue to function as a “necessary corollary” to the protection against unreasonable searches and seizures itself.<sup>141</sup>

The *Canelo* court did not outline the dimensions of the privacy-based exclusionary rule, and the privacy rationale in itself does not prescribe a distinct doctrinal path under the New Hampshire Constitution—after all, the federal rule, too, is ultimately concerned with privacy.<sup>142</sup> In a case decided five years later, *Lopez v. Director, New Hampshire Division of Motor Vehicles*,<sup>143</sup> the New Hampshire court addressed the question of whether the exclusionary rule applies to driver’s license revocation proceedings.<sup>144</sup> The court concluded that the rule should not be applied in civil cases, reasoning that the U.S. Supreme Court has specifically limited the application of the exclusionary rule to

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138. See *Canelo*, 653 A.2d at 1104-05.

139. *Id.* at 1105 (quotation and citations omitted).

140. *Id.* at 1004.

141. The New Hampshire Supreme Court also alluded to other rationales for the exclusionary rule which essentially had been abandoned by the U.S. Supreme Court, like judicial integrity. *United States v. Calandra*, 414 U.S. 338, 347 (1974) (stating exclusionary rule’s “prime purpose is to deter future unlawful police conduct”).

142. See, e.g., *Hudson v. Michigan*, 547 U.S. 586, 593 (2006) (suggesting exclusionary rule protects a person’s entitlement to shield information from the government when the police conduct a warrantless search).

143. *Lopez v. N.H. Div. of Motor Vehicles*, 761 A.2d 448 (N.H. 2000).

144. See *id.* at 449.

criminal trials,<sup>145</sup> under federal law, the rule will not be applied in probation or parole proceedings, grand jury matters, or civil tax cases.<sup>146</sup> The New Hampshire Supreme Court also noted that other state courts, interpreting their own constitutions, had concluded that evidence inadmissible in a criminal trial could still be presented in license revocation proceedings.<sup>147</sup>

The court's ruling in *Lopez* makes no sense if the court meant what it said in *Canelo*, when it discounted deterrence as the principal rationale for the exclusionary rule. If, as the court suggested in *Canelo*, the primary purpose of the exclusionary rule is to remedy an individual's loss of privacy by placing "the parties in the position they would have been in" absent the illegal search,<sup>148</sup> logically the state should not be permitted to use illegally-obtained evidence in a civil case, like a license revocation proceeding. The loss of privacy, after all, does not depend upon the possibility of incarceration—the government action constituting the privacy invasion is the same no matter what penalty the individual may face.

The fact that the *Lopez* court did not see *Canelo* as mandating enforcement of the exclusionary rule in the civil context demonstrates the relative strength of the federal doctrinal path. Even in light of a relatively recent state precedent suggesting that the court had aimed to distinguish state law from federal law in respect to the exclusionary rule and the purpose of the protection against unreasonable searches and seizures, the principle animating the federal rule prevailed in *Lopez*.<sup>149</sup> That this was a case decided by a court that has long claimed to value independent state constitutionalism shows just how difficult it may be to break free of path dependence in constitutional individual rights cases.

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145. See *id.* at 451.

146. See, e.g., *Pa. Bd. Prob. & Parole v. Scott*, 524 U.S. 357, 367 (1998) (concluding that "[t]he deterrence benefit of the exclusionary rule [in probation and parole hearings] would not outweigh the costs").

147. *Lopez*, 761 A.2d at 451.

148. See *State v. Canelo*, 653 A.2d 1097, 1105 (N.H. 1995).

149. The importance of uniformity with federal law, particularly in the area of criminal procedure, has been suggested by courts and commentators as reason to employ a lock-step analysis. See WILLIAMS, *supra* note 31, at 194-209 (discussing lockstepping as an interpretive methodology). But that justification is inapplicable here, in the context of a case decided by a court that has expressly proclaimed its intention to analyze state constitutional claims independently. See Long, *supra* note 1, at 84 (discussing the New Hampshire Supreme Court and independent state constitutionalism).

## 2. Equality and the Vermont Constitution

Let's turn now to a case involving the enforcement of a state constitutional equality provision. In *Baker v. State*,<sup>150</sup> the Vermont Supreme Court addressed the question whether the refusal to issue same-sex couples marriage licenses violated the equality guarantee of the Vermont Constitution. That court, like the New Hampshire Supreme Court, has expressed a commitment to independent state constitutionalism.<sup>151</sup> Like many state constitutions, and unlike the Fourteenth Amendment to the U.S. Constitution, the Vermont Constitution does not safeguard equal protection under the law.<sup>152</sup> Rather, the issue in *Baker* concerned the meaning of the state corollary to the Equal Protection Clause—the “Common Benefits Clause,” Chapter I, Article 7—which is textually distinguishable from its federal counterpart. The plaintiffs argued that their exclusion from eligibility for marriage licenses violated their “right to the common benefits and protections of the law guaranteed by Chapter I, Article 7.”<sup>153</sup>

The *Baker* court reviewed the text and history of the Common Benefits Clause, concluding that “[t]he concept of equality at the core” of the Clause “was not the eradication of racial or class distinctions, but rather the elimination of artificial government preferments and advantages.”<sup>154</sup> In view of its textual and historical analysis, the court rejected the federal equal protection standard, with its emphasis on scrutiny that varies with the interest implicated or the class affected, as the appropriate doctrinal framework.<sup>155</sup> Rather, the focus of a Common Benefits Clause analysis would be whether a challenged law bears a “reasonable and just relation to [a] governmental purpose.”<sup>156</sup> Under this test, a court should seek to identify (1) “the part of the community disadvantaged by the law” and (2) “the significance of the benefits and protections” at issue, and ascertain (3) whether the law promotes the

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150. *Baker v. State*, 744 A.2d 864 (Vt. 1999).

151. See, e.g., *State v. Jewett*, 500 A.2d 233, 239 (Vt. 1985) (urging advocates in the state bar to raise and brief state constitutional issues).

152. See WILLIAMS, *supra* note 31, at 209 (noting that “[m]ost state constitutions do not contain an ‘equal protection’ clause,” though “they do contain a variety of equality provisions”).

153. *Baker*, 744 A.2d. at 869-70. The plaintiffs raised claims under the federal constitution as well, but the court did not reach those arguments. See *id.* at 870 n.2.

154. *Id.* at 876.

155. See *id.* at 878 (rejecting the “rigid, multi-tiered analysis” that applies under equal protection review). As one commentator put it, “Three distinct levels of scrutiny—rational basis, intermediate or strict—may be the best way to assess equal-protection [sic] claims, but it is hardly the self-ordained way.” Sutton, *supra* note 41, at 175.

156. *Baker*, 744 A.2d at 878-79.

government's ends, and (4) whether the classification "is significantly underinclusive or overinclusive."<sup>157</sup>

Applying this test in *Baker*, the court held the marriage license prohibition created a classification that disadvantaged only same-sex couples.<sup>158</sup> The court viewed the interest at stake—the freedom to marry—as a "vital personal right[],"<sup>159</sup> and the benefits and protections of marriage as significant.<sup>160</sup> Though the court credited the purposes of the law advanced by the government, including a legitimate and longstanding interest in promoting parental commitment to children,<sup>161</sup> it nonetheless found the law fatally underinclusive, reasoning, for example, that many opposite-sex couples marry for reasons unrelated to procreation, and recognizing "the reality today . . . that increasing numbers of same-sex couples are employing increasingly efficient assisted-reproductive techniques to conceive and raise children."<sup>162</sup>

Within a year of deciding *Baker*, the court had an opportunity to apply its newly-minted equality analysis in a case called *OMYA, Inc. v. Town of Middlebury*.<sup>163</sup> There, the plaintiff appealed from an administrative decision limiting the number of trips its trucks could complete each day through a particular village.<sup>164</sup> The plaintiff argued, among other things, that the regulation "violate[d] equal protection under the Vermont Constitution[,] "<sup>165</sup> because other truck operators were not subject to a similar restriction.<sup>166</sup> The court began its analysis under the Common Benefits Clause by remarking that "[c]ourts have consistently upheld less than comprehensive legislation out of a recognition that, for reasons of pragmatism or administrative convenience, the legislature may choose to address problems incrementally."<sup>167</sup> The first two cases cited in support of this proposition are federal equal protection

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157. *Id.* at 879.

158. *See id.* at 880.

159. *Id.* at 883 (quotation omitted).

160. *See id.* The benefits and protections include the right to receive a portion of the estate of a spouse who dies intestate and protection against disinheritance, preference in appointment as the person representative of a spouse who dies intestate, the right to bring a wrongful death suit in respect to a spouse, and the right to bring an action for loss of consortium. *See id.* at 883-84.

161. *See id.* at 881.

162. *Id.* at 882.

163. *OMYA, Inc. v. Town of Middlebury*, 758 A.2d 777 (Vt. 2000).

164. *See id.* at 779.

165. *Id.*

166. *See id.* at 780.

167. *Id.* at 781.

decisions.<sup>168</sup> At no point did the court purport to apply any part of the test it had recently announced in *Baker*.

This is in contrast to *In re Estate of Murcury*,<sup>169</sup> in which the court relied expressly upon the Common Benefits analysis articulated in *Baker*. In *Murcury*, the petitioner challenged a statute requiring a nonmarital child who claims an inheritance from a putative father to establish paternity through a parentage action and motion for genetic testing before the age of twenty-one.<sup>170</sup> The petitioner initiated his action at the age of thirty-eight, arguing that advances in genetic testing “rendered obsolete any justification for a limit on the inheritance rights of nonmarital children based upon an interest in preventing the bringing of stale or fraudulent claims.”<sup>171</sup> Therefore, he argued, the statutory time limit had no “reasonable and just relation to the governmental purpose” under the Common Benefits Clause.<sup>172</sup>

In applying the test set out in *Baker*, the court initially concluded that the statute created a classification, and that the class of nonmarital children had “long been the subject of invidious discrimination,” and that “intestate succession is a significant benefit.”<sup>173</sup> Still, the court remained unconvinced that the statutory time limit did not promote reasonable and just governmental objectives, like requiring that an action is brought during the putative father’s lifetime to ensure his availability for genetic testing.<sup>174</sup> In addition, the governmental policy “facilitates better informed estate planning (even in the absence of a will) and helps to avoid last-minute disputes and delays in estate administration.”<sup>175</sup> Finally, the court concluded, the statute does not create a complete exclusion from inheritance rights; it merely conditions the ability to seek relief within a reasonable time period.<sup>176</sup>

No doubt the Vermont Supreme Court faithfully sought to apply the Common Benefits test it had developed in *Baker*: it identified both a part of the community affected by the statutory time limit—nonmarital children—and a significant benefit—intestate succession. The court concluded the government had a legitimate government objective in creating this classification—ensuring the expeditious resolution of

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168. See *id.* (citing *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955)).

169. *In re Estate of Alan B. Murcury*, 868 A.2d 680 (Vt. 2004).

170. VT. STAT. ANN. tit. 15, § 302 (2010).

171. *Murcury*, 868 A.2d at 684.

172. *Id.* (quoting *Baker v. State*, 744 A.2d 864, 879 (Vt. 1999)).

173. *Murcury*, 868 A.2d at 684 (quoting *Baker v. State*, 744 A.2d 864, 879 (Vt. 1999)).

174. *Id.* at 685.

175. *Id.* at 686.

176. See *id.*

paternity disputes related to inheritance rights—and a reasonable fit between its ends and the means chosen to achieve those ends—the statutory time limit of twenty-one years.<sup>177</sup> Yet the court's application of the *Baker* test in *Murcury* suggested the Common Benefits doctrinal framework might not be such a departure from the federal equal protection standard after all. Indeed, little of the analysis under *Baker*, as exemplified by its use in *Murcury*, cannot be readily traced to federal equal protection doctrine.

Under the federal equal protection framework, the court must identify a classification and examine the law's fit between governmental ends and means in respect to that classification.<sup>178</sup> The first part of this analysis involves an inquiry into whether the law implicates a suspect class, such as race or ethnicity, or whether it discriminates on the basis of a fundamental interest, like the right to vote.<sup>179</sup> If the court finds that the law discriminates on the basis of a suspect class or fundamental interest, it must next determine whether that law is supported by a compelling justification and whether the means chosen to achieve the government's aims are narrowly tailored.<sup>180</sup> This kind of intense judicial review is of course known as "strict scrutiny."

The mine-run of cases, however, do not implicate either a suspect class or a fundamental interest; absent either, the court need only assess the reasonableness of the relationship between ends and means. This highly deferential standard is well-known as "rational basis review."<sup>181</sup> Together with the few instances in which a kind of intermediate review is warranted, as when a law implicates a quasi-suspect classification such as sex,<sup>182</sup> there are three levels of equal protection review, and which level a court applies will depend upon the result of its initial inquiry into the nature of the discrimination alleged under the law at issue.

In rare cases, the U.S. Supreme Court has applied an enhanced rational basis test. More deferential than intermediate scrutiny, less deferential than ordinary rational basis scrutiny, this analysis has been

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177. See *id.* (stating that the court "discern[ed] no basis to invalidate the statute under the Common Benefits Clause, or to disturb the judgment of the trial court").

178. See LOUIS MICHAEL SEIDMAN, *EQUAL PROTECTION OF THE LAWS* 37-38 (2003) (discussing analytical steps prescribed by federal equal protection doctrine).

179. See *Baker v. Carr*, 369 U.S. 186, 208 (1962) (holding right to vote is fundamental under federal equal protection guarantee).

180. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (explaining that highest level of equal protection review—strict scrutiny—applies to racial classifications).

181. See, e.g., *Romer v. Evans*, 517 U.S. 620, 631 (1996) (noting that laws that do not target a suspect class or burden a fundamental interest will be upheld so long as the law's classification "bears a rational relation to some legitimate end").

182. See SEIDMAN, *supra* note 178, at 245 (discussing intermediate equal protection review).

used when either the class affected has suffered discrimination on the basis of its inherent characteristics, but cannot be deemed suspect, like race or ethnicity, or the interest affected is more than a mere economic interest, but less than fundamental one. A classic example of this analysis by the U.S. Supreme Court features prominently in *City of Cleburne v. Cleburne Living Center*.<sup>183</sup> In that case, the city, pursuant to a municipal zoning ordinance, denied a special use permit for the operation of a home for the mentally retarded.<sup>184</sup> The Court held the government action unconstitutional, not because the mentally retarded are a suspect class, but because the asserted justifications for the denial appeared to rest on irrational prejudice rather than any legitimate basis for treating a home for the mentally retarded differently from other similarly-situated facilities.<sup>185</sup>

State courts have also applied a form of enhanced rational basis review under their state constitutions. In *Goodridge v. Department of Public Health*,<sup>186</sup> for example, the Massachusetts Supreme Judicial Court—which has employed the federal equal protection framework under the equality provisions of the Massachusetts Constitution<sup>187</sup>—addressed the constitutionality of the Commonwealth’s prohibition on same-sex marriage. The court concluded that the plaintiffs’ claim involved a significant personal interest—the freedom to marry a person of one’s own choosing.<sup>188</sup> That interest may be distinguished from one based upon shifting economic arrangements, like the interest in employment, but the court did not declare it to be fundamental.<sup>189</sup> Nonetheless, in light of the importance of the freedom to marry a person of one’s own choosing, the court subjected the asserted justifications for the prohibition on same-sex marriage to more searching review, holding that the record did not support a link between the prohibition and the Commonwealth’s legitimate aims. For example, while the legislature had a rational basis for ensuring an optimal setting for child-rearing, the Commonwealth could not demonstrate that limiting marriage to opposite-sex couples would actually further that goal.<sup>190</sup>

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183. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985).

184. *See id.* at 435.

185. *See id.* at 449-50.

186. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

187. *See Dickerson v. Att’y Gen.*, 488 N.E.2d 757, 759 (Mass. 1986) (“For the purpose of equal protection analysis, [the] standard of review under the cognate provisions of the Massachusetts Declaration of Rights is the same as under the Fourteenth Amendment. . .”).

188. *See Goodridge*, 798 N.E.2d at 959.

189. *See id.*

190. *Id.* at 962-63.



Though the *Baker* court made an effort to connect its equality doctrine to the text and history of the Common Benefits Clause, in its operational form the four-part analysis appears simply to be a version of the enhanced rational basis test employed in cases like *City of Cleburne* and *Goodridge*. The Common Benefits Clause analysis is tiered scrutiny without the tiers—a one-size-fits-all test that seeks to determine, like the enhanced rational basis test, whether in the circumstances of the case the challenged government action discriminates against an identifiable class in an unreasonable way. Though not without its drawbacks,<sup>191</sup> this approach at least allows a court to police legislative classifications while avoiding the need to rule broadly that certain classes are suspect or interests fundamental—rulings which tend to end rather than promote democratic debate about particular issues.<sup>192</sup> But we should not mistake *Baker* for a decision that marks true doctrinal innovation in the area of equality law: as the discussion in *Murcury* shows, the arguments under the Common Benefits Clause test will in nearly all respects resemble those that attorneys would make if the claims were raised under the appropriate level of equal protection scrutiny.<sup>193</sup> In this way, the path marked by the Common Benefits Clause analysis may trace its origins to federal precedent.

### 3. Conclusion

State courts may claim to strive for independence in interpreting the individual rights provisions of their own constitutions, but, as *Canelo* and *Baker* demonstrate, the leitmotif of “independent” constitutional analyses often reflects principles derived from federal constitutional doctrine. In

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191. See Lawrence Friedman & Charles H. Baron, *Baker v. State and the Promise of the New Judicial Federalism*, 43 B.C. L. REV. 125, 143 (2001) (suggesting the *Baker* approach “reasonably could be construed to involve the courts in scrutinizing all manner of legislative enactment,” while its ambiguity provides little guidance to the political branches or lower courts).

192. See Lawrence Friedman, *Public Opinion and Strict Scrutiny Equal Protection Review: Higher Education Affirmative Action and the Future of the Equal Protection Framework*, 24 B.C. THIRD WORLD L.J. 267, 280-82 (2004) (discussing enhanced equal protection review in *Baker* and *Goodridge*).

193. Compare *OMYA, Inc. v. Town of Middlebury*, 758 A.2d 777 (Vt. 2000) (reviewing application of the *Baker* test to administrative regulations), with *In re Estate of Mercury*, 868 A.2d 680 (Vt. 2004) (relying upon federal case law to guide its analysis under the Common Benefits Clause to conclude that nonmarital children are subject to invidious discrimination). See *supra* notes 163-77 and accompanying text. In his study of state constitutional equality provisions, Jeffrey Shaman noted that “federal thinking about equality still dominates state constitutional law.” JEFFREY M. SHAMAN, *EQUALITY AND LIBERTY IN THE GOLDEN AGE OF STATE CONSTITUTIONAL LAW* 15 (2008). See also Mazzone, *supra* note 75, at 6 (observing that state courts “have tended to hew to the [Supreme] Court’s understandings of analogous provisions in the Federal Constitution”).

both *Canelo* and *Baker*, the courts superficially distinguished their state doctrinal frameworks from the correlative federal doctrinal frameworks. But in neither case did the court articulate an approach to resolving constitutional disputes arising under the protection against searches and seizures or the commitment to equality that represented truly original thinking about the optimally effective doctrinal path under the state constitution. And, as noted above,<sup>194</sup> these decisions were produced by courts that purport to eschew the interpretive approach known as “lockstepping,” pursuant to which the court interprets state constitutional individual rights provisions in lockstep with the federal courts.<sup>195</sup>

Applying the lessons of path dependence theory, the New Hampshire and Vermont Supreme Courts can be seen as essentially “locked-in” to the contours of the federal doctrines that guide search and seizure and equality determinations under the U.S. Constitution. This lock-in is a result of the same congruence of factors that Paul David identified as responsible for the lock-in of the QWERTY keyboard arrangement: technical interrelatedness, economies of scale, and the irreversibility of investment.<sup>196</sup>

Technical interrelatedness is represented in the context of independent state constitutional decisionmaking by the knowledge of federal constitutional law shared by attorneys educated in United States law schools. Though American law schools train students to engage in legal reasoning in the abstract, to discern principles and to theorize about doctrinal possibilities,<sup>197</sup> when it comes to thinking about and making constitutional arguments, students likely have little or no practical experience except in relation to issues arising under the United States Constitution. “The study of American constitutional law,” Bob Williams has observed, “has been dominated by a virtually exclusive focus on the federal Constitution and its judicial interpretation.”<sup>198</sup> Indeed, relatively

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194. See *State v. Jewett*, 500 A.2d 233, 238-39 (Vt. 1985); Long, *supra* note 1, at 84; see also *supra* notes 134 and 151 and accompanying text (discussing the declared commitment to independent state constitutionalism of both the New Hampshire Supreme Court and the Vermont Supreme Court).

195. For a discussion of the varieties of lockstep state constitutionalism, see WILLIAMS, *supra* note 31, at 193-232 (reviewing and critiquing the various approaches to lockstepping state and federal individual rights jurisprudence).

196. See David, *supra* note 85, at 334-36 (describing the features “which were crucially important in causing QWERTY to become ‘locked in’ as the dominant keyboard arrangement”).

197. See Kris Franklin, “*Theory Saved My Life*,” 8 N.Y. CITY L. REV. 599, 610-11 (2005) (arguing that law schools expose students to a variety of theoretical approaches for interpreting legal texts).

198. ROBERT F. WILLIAMS, *STATE CONSTITUTIONAL LAW: CASES AND MATERIALS* xiii (Matthew Bender 4th ed. 2006).

few law schools even offer courses in state constitutional law,<sup>199</sup> while the study of federal constitutional law is generally mandatory. We saw the effect of a federal focus in *Murcury*, as the Vermont Supreme Court in that case refined its Common Benefits analysis into a four-part test whose elements and application ultimately resembled the kind of equal protection balancing practiced by the federal courts.

Technical interrelatedness leads to economies of scale. Faced with an individual rights issue under a state constitution, the user costs, at least in terms of time, for all American-trained attorneys—advocates as well as state court judges and their law clerks—remain relatively low if the analytical approach employed in state and federal constitutional cases is the same or reasonably similar. Simply put, in the case of a state constitutional individual rights claim, state court reliance upon federal doctrinal constructs creates efficiencies and aids a court's ability to effectively manage its workload.<sup>200</sup> The more a state court relies upon federal individual rights frameworks when addressing the meaning of the correlative provisions of the state constitution, the more the cost of trying to independently articulate or reconfigure state constitutional doctrine will increase.

Coordination issues among a court's members could add to the potential cost of reconfiguring state doctrine. Fredrick Schauer has suggested, in the context of statutory construction, that the "plain meaning" rule, despite its crudeness, at least allows justices who may have "divergent views and potentially different understandings . . . [to] still be able to agree about what the language they all share requires."<sup>201</sup> Accordingly, although plain meaning may be regarded as a second-best approach to statutory construction, it provides a means by which people with different views and experiences can reach some agreement.<sup>202</sup> In the context of an individual rights challenge, federal constitutional

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199. See Sutton, *supra* note 41, at 166 (observing that "most law schools do not teach state constitutional law, and none [to Sutton's knowledge] offers it as a core part of its curriculum").

200. Cf. RICHARD A. POSNER, HOW JUDGES THINK 145 (2008) (suggesting one reason appellate courts are motivated to follow precedent is to limit their workloads; "[a]dherence to precedent does this both directly, by reducing the amount of fresh analysis that the judges have to perform, and indirectly, by reducing the number of appeals, since the more certain the law, the lower the litigation rate"); Clayton P. Gillette, *The Path Dependence of the Law*, in *THE PATH OF THE LAW AND ITS INFLUENCE: THE LEGACY OF OLIVER WENDELL HOLMES, JR.* 245, 267 (Steven J. Burton ed., 2000) (speculating that "[j]udges who wish to increase their reputation with their peers may simply want to clear their dockets quickly, so that they are not seen as imposing a heavy caseload on their colleagues").

201. Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231, 254 (1991).

202. See *id.* at 255.

doctrine similarly may offer a second-best approach to interpreting a state constitutional mandate, but it likely eases coordination of a state supreme court's members around a single approach, particularly when the alternative is novel and, therefore, untested.

Over time, a state court's reliance upon federal frameworks leads to the quasi-irreversibility of its initial investment in adapting federal doctrine to its own ends.<sup>203</sup> At a certain point, the court becomes locked-in. Recall the consequences of the New Hampshire Supreme Court's reliance upon a federal framework in *Lopez*, in which the court reverted without discussion to the federal exclusionary rule analysis it had attempted to distinguish in *Canelo*, a case decided just a few years earlier.

To be clear, decisions like *Canelo* and *Baker*, and their respective progeny, do not represent the path dependency of particular federal judicial decisions. The New Hampshire and Vermont courts reached conclusions in each of those cases that the U.S. Supreme Court, applying the same essential doctrinal tests, likely would not have reached; in *Leon*, for example, decided in 1984, the Supreme Court expressly reasoned that a good faith exception would not interfere with the aim of the exclusionary rule to deter police misconduct.<sup>204</sup> Rather, decisions like *Canelo* represent the path dependence of particular modes of analysis—of the continued reliance by state courts upon doctrinal templates developed by the United States Supreme Court to implement individual rights provisions of the U.S. Constitution.

Like the QWERTY keyboard arrangement, federal individual rights doctrines have become so familiar to how we think about constitutional law that it is difficult to imagine that there could be a different way to approach a given individual rights problem. As the discussion of equality under the Vermont Constitution demonstrates, even the state courts that purport to be doing the hard work of implementing the equality provisions of their own constitutions, which may be textually distinguishable from the Federal Equal Protection Clause, are not actually proposing grand doctrinal innovations. Once one gets past the absence of formal tiers of scrutiny, the Vermont approach to equality enforcement in *Baker* looks very much like the enhanced rational basis

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203. See Hathaway, *supra* note 89, at 631 (explaining, in respect to the common law, that once a particular doctrinal path has taken hold, a switch to a new doctrine becomes infeasible, despite the existence of superior alternatives).

204. *United States v. Leon*, 468 U.S. 897, 924 (1984) (allowing good faith exception to the exclusionary rule).

review originally developed and employed by the United States Supreme Court.<sup>205</sup>

The simple and unremarkable point here is that the hold of path dependence over state constitutional individual rights interpretation and doctrinal development can be exceedingly strong. State courts in reality are, time and again, importing into state law the essential features of the doctrinal frameworks that the federal courts have developed, and that they continue to apply in cases challenging government action under the individual rights provisions of the federal constitution. In the next Part, I address why state courts in general are unlikely to undertake independent doctrinal inquiries when presented with opportunities to do so.

### III. EXTERNAL CONSTRAINTS ON STATE CONSTITUTIONAL DECISIONMAKING

Path dependence arises from chance events rather than systematic forces.<sup>206</sup> In this Part, I examine the events that have led to path dependent state constitutional decisionmaking in individual rights cases in an effort to understand why the doctrinal paths set out by the United States Supreme Court seem in many instances to be inescapable. The answer may lie in the external constraints that act in concert to limit a state court's ability to engage in independent state constitutional inquiry. These constraints push the court to adopt, in some form, the federal doctrinal framework associated with a particular individual right or liberty. If this is the case, then we need to inquire whether those constraints could ever be overcome: would it ever be possible for advocates to convince state courts to resist the pull of path dependence or to revisit its prior path-dependent doctrinal determinations?

#### A. *Whence Path Dependent State Constitutionalism?*

Why would a state court be inclined, in thinking about how a state constitutional provision should be interpreted and applied, to eschew doctrinal development and instead adopt a version of an existing federal framework?<sup>207</sup> The explanation centers on the conditions under which state courts operate, conditions which are not of their making. As in the example of the QWERTY keyboard configuration, the path dependent

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205. See *supra* notes 156-57 and accompanying text (discussing the Common Benefits Clause framework).

206. See David, *supra* note 85, at 332.

207. The efficiency of abiding by established frameworks in later cases in the same jurisdiction, whatever the origin of those frameworks, seems clear; this is a species of the path dependence observed in common law decisionmaking. See Gillette, *supra* note 90, at 822 (discussing the benefits of "economizing on judicial effort and ensuring that similar cases are treated similarly").

nature of state constitutional individual rights development is a function of chance elements converging just so.<sup>208</sup> There is no systematic reason, after all, why a state court that has expressly committed itself to independent state constitutional inquiry (as opposed to one committed instead to uniform constitutional interpretation) should *ex ante* adopt the same doctrinal approach to a particular individual rights issue as the federal courts.<sup>209</sup> And yet, what David wrote in the context of QWERTY's historical hold seems equally applicable here: while state courts proclaim their "'free[dom] to choose,' their behavior, nevertheless, is held fast in the grip of events long forgotten and shaped by circumstances in which neither they nor their interests figured."<sup>210</sup>

The circumstances that shape the constraints on a state court's ability to undertake truly independent constitutional analysis of individual rights provisions have to do with the lack of resources that would allow the court to engage in doctrinal development in a given case, as compared with the ready availability of doctrinal frameworks via the reported cases of the federal courts, particularly the U.S. Supreme Court. That is to say, inconsistent independent doctrinal development flows from the constraining effects of resource limitations. Which resource? For our purposes, the central resource necessary to engage in doctrinal development may be time. The ability of a state court to focus upon state constitutional doctrinal development in individual rights cases can be understood in temporal terms, as a function of the size of a court's docket of pending cases, along with the amount of intellectual capacity among judges and law clerks that can be allocated to case disposition.<sup>211</sup>

Let's begin with docket size and intellectual capacity in the U.S. Supreme Court. In the *2008 Year-End Report on the Federal Judiciary*, U.S. Supreme Court Chief Justice John Roberts noted that, in the 2007 term, 8,241 cases were filed with the Court and 75 cases were argued; the Court disposed of 72 of those cases in 67 signed opinions.<sup>212</sup> The

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208. See David, *supra* note 85, at 332.

209. Again, I emphasize that I am addressing in this article the work of those state courts that claim to embrace independent state constitutional analysis, like the New Hampshire and Vermont Supreme Courts, and not those that, for one reason or another, engage in lockstepping their constitutional analyses with those of the federal courts, interpreting the federal constitution. See *supra* note 195 (discussing lockstepping as interpretive methodology).

210. David, *supra* note 85, at 333.

211. "A judicial decision is both an intellectual and a moral act." Charles Fried, *Constitutional Doctrine*, 107 HARV. L. REV. 1140, 1155 (1994). I suspect another possible encroachment on the time available for case disposition in many states is the fact of some kind of judicial election—at a minimum, the process of retaining one's judgeship must divert some attention from the business of writing judicial decisions.

212. *Appendix*, in 2008 YEAR-END REPORT ON THE FEDERAL JUDICIARY at 10, available at <http://www.supremecourt.gov/publicinfo/year-end/year-endreports.aspx>.

Court also issued 67 signed opinions in the previous term.<sup>213</sup> While the nine justices had to sift through many thousands of certiorari requests to find those 75 cases, each justice had the assistance of three or four law clerks in doing so. During the 2007 term, no justice wrote—presumably with the help of one or more law clerks—more than eight full opinions of the Court.<sup>214</sup> In that term, the average number of opinions of the Court per justice was about seven.<sup>215</sup> In short, although the 2007 term of the U.S. Supreme Court was only nine months, the structure of the justices' workload was such that they and their clerks could devote a substantial amount of time to thinking through the arguments presented in the half-dozen or so constitutional individual rights cases on that term's docket.<sup>216</sup>

Now compare this summary of the U.S. Supreme Court's 2007 docket and intellectual capacity with the comparable docket and resources available to the New Hampshire and Vermont Supreme Courts in 2006 and 2007. In 2006, the New Hampshire court, with five justices<sup>217</sup> and two clerks per justice,<sup>218</sup> had 964 incoming cases,<sup>219</sup> of which it resolved 522, 158 by full opinion.<sup>220</sup> That is more than twice the number of cases resolved by full opinion than the U.S. Supreme Court addressed in its 2007 term. And each justice of the New Hampshire Supreme Court wrote more than 30 full opinions over the course of the year—more than three times the number any one justice of the U.S. Supreme Court wrote. Meanwhile, in 2007 the Vermont court, with the same number of justices as in New Hampshire, and with just one law clerk per justice, had 530 incoming cases,<sup>221</sup> of which it resolved 313, with 80 by full opinion.<sup>222</sup> That is more than the number of full opinions issued by the U.S. Supreme Court in 2007 with four fewer justices and a

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213. *See id.*

214. *The Supreme Court—the Statistics*, 122 HARV. L. REV. 516, 516 (2008) (Table I, "Actions of Individual Justices").

215. Four justices each wrote eight full opinions for the Court in the 2008 term; the others wrote seven each. *See id.* The justices, of course, did write concurring and dissenting opinions in many cases, but no justice wrote more than 28 opinions in total; that was Justice John Paul Stevens. *See id.*

216. *See id.* at 527-29 (Table III, "Subject Matter of Dispositions with Full Opinions").

217. *See* THE COUNCIL OF STATE GOVERNMENTS, *THE BOOK OF THE STATES* 294-95 (2009) (Table 5.1, "State Courts of Last Resort").

218. *See* BUREAU OF JUSTICE STATISTICS: *STATE COURT ORGANIZATION* 2004, 123-24 (2006) (Table 20, "Provision of Law Clerks to Appellate Court Judges").

219. COURT STATISTICS PROJECT, *STATE COURT CASELOAD STATISTICS: AN ANALYSIS OF 2007 STATE COURT CASELOADS* 152 (National Center for State Courts 2009) (Table 11, "Reported Grand Total State Appellate Court Caseloads"). The Court Statistics Project relied upon data from 2006 for New Hampshire. *See id.* at 153 n.†.

220. *Id.* at 179 (Table 16, "Opinions Reported by State Appellate Courts, 2007").

221. *Id.* at 152 (Table 11, "Reported Grand Total State Appellate Court Caseloads").

222. *Id.* at 179 (Table 16, "Opinions Reported by State Appellate Courts").

fraction of the law clerk resources. And each justice of the Vermont Supreme Court wrote about 16 full opinions, twice the number written by the busiest U.S. Supreme Court justice.

The 2008 statistics show little variance. In that year, Chief Justice Roberts reported that 7,738 cases were filed with the U.S. Supreme Court, of which the Court heard arguments in 87.<sup>223</sup> The Court issued 74 signed opinions, of which no justice wrote more than eleven.<sup>224</sup> The average number of opinions per justice was about eight.<sup>225</sup> In contrast, in 2008 the Vermont Supreme Court had 503 incoming cases,<sup>226</sup> of which it resolved 344, with 100 by full opinion.<sup>227</sup> Each justice wrote approximately 20 full opinions, about double the number written by the busiest U.S. Supreme Court justice during the 2008 term and more than twice the average number written by the majority of the justices on the U.S. Supreme Court.<sup>228</sup>

Of course, all cases are not the same. Some matters inevitably will take more judicial time and attention than others, and the state court dockets and advance sheets are filled with cases addressing matters raising state statutory and common law claims that do not warrant more than a few pages of explanation from the court. Still, the prospect of independent state constitutional doctrinal development seems daunting given the time and resources available to a court.<sup>229</sup> To illustrate more

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223. *Appendix*, in 2009 YEAR-END REPORT ON THE FEDERAL JUDICIARY at 2, *available at* <http://www.supremecourt.gov/publicinfo/year-end/2009year-endreport.pdf>.

224. *The Supreme Court—the Statistics*, 123 HARV. L. REV. 382, 382 (2009) (Table I, “Actions of Individual Justices”).

225. Three justices each wrote 8 opinions, while one wrote 11, one wrote 9, and the others 7. *See id.*

226. COURT STATISTICS PROJECT, STATE COURT CASELOAD STATISTICS: AN ANALYSIS OF 2008 STATE COURT CASELOADS 97 (Nat’l Ctr. for State Courts, 2010) (Table 11, “Reported Grand Total State Appellate Court Caseloads, 2008”).

227. *Id.* at 127 (Table 16, “Opinions Reported by State Appellate Courts, 2008”).

228. *See id.* Even courts with memberships closer to the U.S. Supreme Court have more work than their federal counterparts. In 2008, the seven justices of the Massachusetts Supreme Judicial Court together decided 222 appeals in 160 full opinions, with each justice writing (with the help of two law clerks) approximately twenty-two opinions. *See* Supreme Judicial Court Case Statistics for Fiscal Years 2006 Through 2010, Massachusetts Supreme Judicial Court, <http://www.mass.gov/courts/sjc/sjc-case-stats.html> (last visited Dec. 28, 2010). In 2007-2008, the seven justices of the California Supreme Court issued 116 written opinions, with each justice writing (with the help of at least five law clerks), 16 opinions, or one-third more than the average of a U.S. Supreme Court justice—while at the same time helping to dispose of 10,440 cases, almost 3,000 more than the U.S. Supreme Court. JUDICIAL COUNCIL OF CALIFORNIA, 2009 COURT STATISTICS REPORT: STATEWIDE CASELOAD TRENDS: 1998-1999 THROUGH 2007-2008, at IX (2009), *available at* <http://www.courtinfo.ca.gov/reference/documents/csr2009.pdf>.

229. For an excellent overview of the docket issues facing state supreme courts, *see* Neal Devins, *How State Supreme Courts Take Consequences Into Account: Toward a State-Centered Understanding of State Constitutionalism*, 62 STAN. L. REV. 1629, 1649-52 (2010).



concretely, let's consider the process by which a state court—we'll use the New Hampshire Supreme Court<sup>230</sup>—typically would go about addressing a case raising an individual rights claim of first impression under the state constitution. Call it the phenomenology of state constitutional individual rights adjudication, premised on the belief that, in trying to understand why the state courts do what they do, it is important, as Duncan Kennedy has argued in respect to federal adjudication, "to start with some particularization."<sup>231</sup>

The New Hampshire Supreme Court each year must address many hundreds of cases appealed from the state's lower trial courts. There is no intermediate appellate court in New Hampshire. The high court's choice of cases to schedule for full briefing and oral argument depends upon a variety of factors, including whether the matter raises an issue in an area in which the law is not settled.<sup>232</sup> This category naturally includes issues of first impression under the state constitution. Once an appeal is accepted and the case is docketed, an oral argument date is set. Briefs are due in advance of the argument.<sup>233</sup>

In general, the justices (and often their law clerks) will review the briefs before oral argument. Some justices may ask their clerks to provide summary memoranda in preparation for argument. Argument is held, fifteen minutes per side. The justices ask their questions, and the attorneys do their best to respond. After a morning or afternoon of arguments—usually four cases per session—the justices retire to conference, where the Chief Justice will take a straw poll. Many decisions of the New Hampshire Supreme Court are unanimous—or will end up being unanimous, after draft opinions are circulated among the justices. Assuming unanimity in how a case should be decided, or at least a majority view, the most senior justice in the majority will assign the case to himself or herself or to a colleague.

After the conference, the justices return to their respective chambers and summon their law clerks. A justice will divide the cases he or she drew from the day's conference—at least one per day of oral argument, but possibly as many as seven to ten after a few days of argument—between his or her two law clerks, likely providing some sense of how a majority of the court viewed each case and possible dispositions. From

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230. I report here from experience: I clerked for Associate Justices William F. Batchelder and John T. Broderick, Jr., of the New Hampshire Supreme Court from September 1995 through August 1997.

231. Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518, 518 (1986).

232. See New Hampshire Judicial Branch, *Supreme Court—Judicial Duties*, <http://www.courts.state.nh.us/supreme/index.htm> (last visited March 6, 2011).

233. N.H. SUPREME CT. R. 16 (7) (specifying when briefs shall be filed).

there, the law clerk takes possession of the briefs and the record of the cases for which he or she is responsible and adds them to the pile of cases from the last oral argument session awaiting research and draft opinions. Weeks may pass before the clerk responsible for drafting a decision in *State v. Canelo*<sup>234</sup> plucks that case from the pile. Even if the clerk attended the oral argument, chances are the exchanges between the court and the attorneys are fading memories.

The law clerk begins, of course, with research. She reads the briefs, making lists of cases to review. She gets a sense of the issues as presented by the attorneys. She sees that the defendant in *Canelo* has argued, among other things, that a good-faith exception is incompatible with the exclusionary rule under the state constitution.<sup>235</sup> In their briefs, the attorneys on both sides rely upon federal decisions to support their arguments, with counsel for the state doing so more than counsel for the defendant.<sup>236</sup> The defendant urges the court to consider state constitutional decisions from other states. Some of those courts depart from the U.S. Supreme Court in how they apply the exclusionary rule framework, emphasizing the protection of individual privacy over the potential deterrent effect of excluding the illegally obtained evidence in the defendant's trial.<sup>237</sup>

Our law clerk reviews several New Hampshire cases discussing the importance of individual privacy under the state constitution. She discovers that, while the state and federal exclusionary rule decisions reach different results, they begin with a common conception of the framework for analyzing violations of the protection against searches and seizures—namely, that the exclusionary rule, whether regarded as judge-made or constitutionally required, will prevail if, on balance, the interests at stake warrant its application. The federal courts apply the rule if it will promote deterrence of police misconduct, and several state courts will also apply the rule when the circumstances warrant a remedy for a privacy violation. Thus, our law clerk could reasonably conclude, based upon the relevant federal and state cases, that while the courts may begin their analyses in the same place, the state courts will in the right circumstances privilege the importance of a remedy for the search victim's privacy injury. Recall that the federal courts shared this view of

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234. *State v. Canelo*, 653 A.2d 1097 (N.H. 1995). The court decided *State v. Canelo* before I began my clerkship. See *supra* note 230.

235. In the actual case, the defendant also argued that the state constitution does not permit the police to apply for anticipatory search warrants. See *Canelo*, 653 A.2d at 1100.

236. See, e.g., Brief for Defendant at 20-30, *State v. Canelo*, 653 A.2d 1097 (N.H. 1995) (No. 93-329) (discussing cases from outside New Hampshire in which court rejected good-faith exception to the exclusionary rule).

237. See *Canelo*, 653 A.2d. at 1105 (citing cases from other jurisdictions).

the exclusionary rule prior to decisions like *Calandra* and *Leon*, in which the Supreme Court ruled deterrence the principal rationale for exclusion.<sup>238</sup>

Because she is essentially responsible for resolving the good-faith issue under the New Hampshire Constitution, and thereby charting the state's future path in this area, our law clerk might consider doing some research outside the briefs and reporters, in the legal literature. But likely she would be inclined to do so only if she determined she had time enough for that research; after all, other controversies—likely more than a few—demand her attention, demand the court's attention. Further, she has her judge's indication of the disposition in *Canelo*: a majority of the court believes deterrence of police misconduct is not the "sole purpose" of the exclusionary rule.<sup>239</sup> She has also found support in other jurisdictions for the conclusion that, at least on the facts of this case, there should be a constitutional remedy for the privacy harm suffered by the search victim. Finally, she has found New Hampshire cases discussing the importance of individual privacy under the state constitution. In view of all this, why should she go further?

Our law clerk will present the draft opinion to her judge. He or she will revise the draft and circulate it among the other chambers. The other members of the court will review the opinion. A judge might ask one of his or her clerks to do some additional research, but there is no institutional incentive to recreate the effort of the chambers initially assigned the case. After all, at the next case conference, the justices will be considering a draft opinion that reaches a result that appears consonant with the values underlying the New Hampshire Constitution's protection against unreasonable searches and seizures, a draft that is supported by New Hampshire precedent and decisions from other jurisdictions. If a member of the majority in *Canelo* were to pause to question whether the federal exclusionary rule framework provides a suitable model for interpreting the New Hampshire constitution, then he or she may take comfort in the embrace of that doctrine by other state courts interpreting their own constitutions.<sup>240</sup>

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238. See *supra* notes 125-132 and accompanying text (discussing historical development of the federal exclusionary rule).

239. See *Canelo*, 653 A.2d at 1105 (concluding deterrence is not the "sole purpose" of the exclusionary rule).

240. The dissent, of course, prefers to rely upon the federal doctrinal constructs in this area of the law, which would tie the exclusionary rule to deterrence of police misconduct. See *id.* at 1112 (Thayer, J., dissenting) ("The cases relied on by the majority contain no analysis of the State Constitution, nor do they explain why departure from the present federal rule and adoption of the repudiated federal rule is appropriate in these circumstances.").

And so our law clerk's effort ultimately was sufficient to resolve this dispute. Though the New Hampshire Supreme Court has long sought to give meaning to the commands of the state constitution, its discussion about *Canelo*—from oral arguments to the justices' case conference—in fact revolved around the applicability of the federal doctrinal framework governing the enforcement of the protection against unreasonable searches and seizures. There simply was too little time to think about anything else.

### *B. Overcoming Path Dependence*

Mark Roe, discussing modern developments in corporate law, has a wonderfully evocative description of the hold of path dependence. He writes:

Today's road depends on what path was taken before. Decades ago, a fur trader cut a path through the woods, and the trader, bent on avoiding a wolves' den and other dangerous sites, took a winding indirect route. . . . Later travelers dragged wagons along the same winding path the trader chose, deepening the grooves and clearing away some trees. Travelers continued to deepen and broaden the road even after the dangerous sites were gone. Industry came and settled in the road's bends; housing developments went up that fit the road and industry. Local civic promoters widened the path and paved it into a road suitable for today's trucks.<sup>241</sup>

Now, Roe proposes, the time has come to resurface the road. "Should today's authorities straighten it out at the same time?"<sup>242</sup> The fact is, he notes, that society, "having invested in the path itself and in the resources alongside the path, is better off keeping the winding road on its current path than paying to build another."<sup>243</sup> It is unlikely, given the investment in the road as it is, that a new road will be built; only if the "path-dependent road" becomes too costly will it be replaced.<sup>244</sup>

Roe might as well be describing the doctrinal dilemma in the world of state constitutionalism. Above, I discussed the purpose of doctrine in operational terms: doctrine is the medium through which constitutional commands are made real and practicable.<sup>245</sup> But respect for doctrine serves other purposes as well. "Doctrine," Fried has argued, "not only

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241. Mark J. Roe, *Chaos and Evolution in Law and Economics*, 109 HARV. L. REV. 641, 643 (1996).

242. *Id.*

243. *Id.*

244. *See id.* at 643-44.

245. *See supra* note 119 and accompanying text (discussing the purposes of constitutional doctrine).

mediates between first principles and particular results along the timeless dimension of inference, but it in fact—if not logical necessity—provides continuity between a particular decision and those that have gone before.”<sup>246</sup> Doctrine is the link between cases and the form through which constitutional commands and commitments persist.<sup>247</sup> And yet, as Fried observes, “a life lived strictly according to plan is mad—and dangerous.”<sup>248</sup> A court must recognize that a point may come when it must start anew—that a doctrinal path, whatever its origin, has led it—led us—“down a blind alley.”<sup>249</sup>

On the analogy that Roe has drawn, how would a state court know that a federal doctrinal road, which the court is inclined to follow for reasons of expediency, will prove too costly because the doctrine will lead the court down a blind alley? It depends, of course, on how cost is defined. One perceived cost might be doctrinal confusion down the line. As David L. Shapiro has put it, “it is hard to overstate the value of coherence and predictability in the law as a basis for avoiding disputes and for facilitating settlements when disputes do arise.”<sup>250</sup> Even constitutional rules, he argues, “affect a wide range of relationships, especially those involving the interaction between the public and private spheres.”<sup>251</sup>

When a state court seeking to engage in independent analysis adapts for state constitutional purposes what appears to be a suitable federal framework, conflicts may arise. The New Hampshire exclusionary rule cases demonstrate this possibility: the later case, *Lopez*, follows from a federal conception of the rule that the earlier case, *Canelo*, discounted based upon a different understanding of the values that the exclusionary rule promotes under the state constitution. It is not clear that these inconsistent results will ever become so problematic—that is, costly—that the New Hampshire Supreme Court will have to devote attention to untangling the doctrinal strands. And it is not clear that even several such instances in a particular area of individual rights jurisprudence would be enough to cause the court to consider undertaking the hard work of articulating a coherent doctrinal framework under the state constitution, one that optimally effectuates the right at issue and is internally consistent. Conflicting results down the line and the accompanying costs are, as I note, merely a possibility, while the

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246. FRIED, *supra* note 119, at 5.

247. *See id.* at 7-8.

248. *Id.* at 8-9.

249. *Id.* at 9.

250. David L. Shapiro, *The Role of Precedent in Constitutional Adjudication: An Introspection*, 86 TEX. L. REV. 929, 942 (2008).

251. *Id.*

constraints on the time the court has available to devote to any particular case today are a relative certainty.

Then there is the question of how a state court might develop its own doctrinal frameworks. As Gardner has demonstrated, a doctrinal approach is unlikely to emerge from state constitutional text or history, at least in respect to those rights protections common to the state and federal constitutions.<sup>252</sup> More likely a judge—or a law clerk—will be impressed by a particular way of understanding an individual right or liberty as presented by an advocate before the court, or by a legal commentator—in other words, by those whom Clayton Gillette refers to as “legal entrepreneurs,” those lawyers who have an incentive to engage in doctrinal innovation.<sup>253</sup>

If state constitutional legal entrepreneurs are to have any chance of success, a state court must be willing to use its discretion to seriously consider a proposed doctrinal innovation.<sup>254</sup> Assuming, as we should, that state court judges will honor their obligation to say what the state constitution means, we would have to hope they will be open to alternative ways of configuring the standards governing how the judiciary should enforce a constitutional commitment to a particular individual right. The legal entrepreneur’s proposal would have to provide some advantage over the relevant federal model in order for the court to believe it would be worth the investment. Such advantages could be understood in a variety of ways. For instance, the proposed test could reflect a more nuanced understanding of the value of the right at issue under the state constitution, or perhaps the proposed test could be used to avoid some of the difficulties the courts have encountered in applying the federal test.

For legal entrepreneurs to succeed in this effort, they must persuade the court that, whatever the relative advantages of the proposed doctrinal standards, those advantages would outweigh the costs of adoption, with the costs measured in terms of the time the court would have to allocate to explicating and applying its new state constitutional test going forward, in future cases. Because the state supreme court is the final arbiter of the meaning of the state constitution, it could consider adopting the proposed constitutional standard knowing that its rule will have to be

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252. See GARDNER, *supra* note 3, at 6-7.

253. See Gillette, *supra* note 90, at 823 (discussing “legal entrepreneurs” and the incentives to overcome precedent).

254. See *id.* at 825 (noting that lock-in effects in respect to common law rules “are highly dependent on judicial incentives to overcome or extend precedent”).

followed by the lower courts.<sup>255</sup> At the same time, however, that certainty would not obviate the cost to the attorneys in the state who will be litigating that individual rights issue—the cost associated with developing arguments under the new test. Recall that, by the time the Vermont Supreme Court decided the *Murcury* case, the new equality test the court announced in *Baker* under the Common Benefits Clause had begun to resemble in its operation a species of federal equal protection doctrine.<sup>256</sup>

Let's return to the hypothetical, phenomenological account of how the New Hampshire Supreme Court decided the good-faith exception issue in *State v. Canelo*.<sup>257</sup> In that account, our law clerk ultimately grounded the court's decision in the New Hampshire cases stressing the importance of individual privacy and the decisions of other state courts that applied differently the federal doctrinal framework used to analyze exclusionary rule problems. Suppose, instead, that counsel for the defendant in *Canelo* had sought to engage in some entrepreneurial lawyering, arguing that the court should adopt a different exclusionary rule framework. Rather than rely upon the federal doctrine, counsel proposes that separation of powers principles should form the basis of a test that would treat violations of the prohibition against unreasonable searches and seizures as instances in which illegal government action should be struck down as a matter of judicial review. This approach finds support in a law review article discussing alternatives to the U.S. Supreme Court's exclusionary rule analysis,<sup>258</sup> as well as in the long-standing view of separation of powers under the New Hampshire Constitution, which emphasizes the distinct roles and obligations of each department of the government.<sup>259</sup>

On this view, a finding that government agents acted illegally, even if they did so in "good faith," would result in exclusion of the evidence seized. As the authors of the article, Thomas S. Schrock and Robert C. Welsh, reasoned, "when search and seizure conduct is successfully challenged as unreasonable," the defendant has a right "to exclusion of

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255. See *id.* at 824 (noting that the "presence of the central authority reduces uncertainty . . . about the willingness of others in the network to adopt the superior standard").

256. See *supra* notes 169-93 and accompanying text (discussing Vermont Supreme Court's application of *Baker* test in *Murcury* case).

257. See *supra* notes 231-40 and accompanying text (discussing the phenomenology of state constitutional decisionmaking).

258. Thomas S. Schrock & Robert C. Welsh, *Up from Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251 (1975).

259. See, e.g., Opinion of the Justices, 688 A.2d 1006, 1010 (N.H. 1997) (noting that separation of powers protects "the sovereignty and freedom of those governed by preventing the tyranny of any one branch of the government being supreme").

the disputed evidence, because exclusion is the only concrete expression which adverse judicial review of unreasonable searches and seizures can take.”<sup>260</sup> Such an approach would essentially eliminate the fact-sensitive inquiry into the relative importance of deterring police misconduct and the gravity of the privacy injury to the search victim. At the same time, the state could be afforded an opportunity to show a compelling reason why evidence in a particular case should not be excluded, notwithstanding the constitutional violation.<sup>261</sup>

After reading defense counsel’s brief, and the law review article upon which counsel based the argument, our law clerk is convinced that this approach best reflects the values embraced by the constitutional protection against unreasonable searches and seizures. But she understands her judge. She knows that, if she were to draft an opinion that adopted this alternative analytical path—one that envisions the protection against unreasonable searches and seizures as functioning in a way fundamentally different from the way in which the U.S. Supreme Court sees the Fourth Amendment functioning—her judge will need convincing. And even if she were successful in that effort, her judge would then have to try and convince his or her colleagues.

There is precedent for this happening, at least in the context of the common law. In *Aranson v. Schroeder*,<sup>262</sup> the New Hampshire Supreme Court addressed a question transferred without ruling from the trial court: does New Hampshire recognize a cause of action for malicious defense? The plaintiffs below argued that allowing a claim for malicious prosecution—which condemns plaintiffs for relying upon false evidence—but not for similar action by the defense was “one-sided and unfair. Both forms of misconduct should be treated the same; both should be condemned, and made the subject of damages.”<sup>263</sup>

The court accepted this argument, reasoning that, absent a claim for malicious defense, the only remedy the plaintiffs had was a demand for

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260. Schrock & Welsh, *supra* note 258, at 309.

261. It’s worth noting that the U.S. Supreme Court’s reliance upon deterrence as an animating rationale for the exclusionary rule was not inevitable. The Court made a choice in the 1970s not to continue to consider the rule a necessary corollary to the Fourth Amendment, though other approaches to enforcing the Fourth Amendment had presented themselves—like the separation of powers. Importantly, the concerns the high court had in mind when it established the current exclusionary rule path might be irrelevant to the work of the state court interpreting the state constitution. See Lawrence G. Sager, *Foreword: State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law*, 63 TEX. L. REV. 959, 974-75 (1985) (discussing strategic concerns that may influence U.S. Supreme Court’s interpretation of constitutional individual rights provisions).

262. *Aranson v. Schroeder*, 671 A.2d 1023 (N.H. 1995).

263. *Id.* at 1026.



sanctions against the defendants for their alleged use of false evidence.<sup>264</sup> That claim, however, would entail a more limited recovery. A plaintiff, the court stated, is no less “aggrieved when the groundless claim put forth in the courts is done defensively rather than affirmatively.”<sup>265</sup> Importantly, in arguing that the court should create a cause of action for malicious defense, the plaintiffs cited to a law review article proposing such a tort.<sup>266</sup> The court, in turn, expressly relied upon that article and arguments derived from it in explaining the new cause of action and articulating a doctrinal standard for its implementation.<sup>267</sup>

I point to this example not to celebrate the utility of academic contributions to litigation disputes, but to show that innovation may in some circumstances be possible. The court’s opinion in *Aranson* seems to suggest that basic fairness concerns won the day—the court was moved to create a remedy for those individuals who might be genuinely aggrieved by a defendant’s use of false evidence in civil litigation. One hopes that such concerns would convince the court to similarly innovate in an individual rights case of constitutional dimension. But then there is the classic distinction between judicial decisionmaking in respect to the constitution and a state’s common law. In constitutional matters, the court will be enacting rules that govern the actions of government until such time as the political will exists to support a constitutional amendment, while the state legislature, if it disapproved of the tort of malicious defense, could statutorily abolish or modify that common law cause of action.

Accordingly, even if the New Hampshire Supreme Court justice assigned *Canelo* were convinced by our hypothetical law clerk to adopt the new exclusionary rule framework suggested by defense counsel, he or she would not only have to convince at least two colleagues that the framework reflected a superior understanding of the constitutional protection against unreasonable searches and seizures and provided a manageable way to address such issues in future cases, but also that those benefits outweighed the costs of change. At a minimum, those costs include the investment of time that the supreme court, the lower courts, and attorneys would have to make in understanding and applying the new doctrinal approach. And this is setting aside concerns that might be raised about how such a move might be perceived—in some states,

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264. See *id.* at 1027.

265. *Id.*

266. See Jonathan K. Van Patten & Robert E. Willard, *The Limits of Advocacy: A Proposal for the Tort of Malicious Defense in Civil Litigation*, 35 HASTINGS L.J. 891 (1984).

267. See *Aranson*, 671 A.2d at 1028-29 (outlining elements of doctrinal standard for tort of malicious defense).

legislatures have sought to cabin the judiciary's discretion to innovate under the state constitution.<sup>268</sup> Legal entrepreneurs may have solid proposals to make, but the potential costs of exploring these proposals point toward continued reliance upon federal doctrinal constructs.

#### IV. THE ENDURING VALUE OF INDEPENDENT STATE CONSTITUTIONALISM

Accepting the limitations imposed by path dependence and the constraints of time on the ability of state courts to innovate doctrinally, still there is something to be said for what state courts can contribute to constitutional individual rights jurisprudence. To illustrate, let's return to *Commonwealth v. Ortiz*—the case involving the application, under the Massachusetts Constitution, of the federal doctrine governing intentional misstatements in a warrant application. Recall that the defendant's attorney had asked for an amicus brief discussing why, under the state constitution, the right to be free from unreasonable searches and seizures should be construed more expansively than under the Fourth Amendment, to invalidate a search based upon a warrant application that omitted certain information about the identification procedures used by the police.<sup>269</sup>

The law in this area derives from *Franks v. Delaware*,<sup>270</sup> in which the U.S. Supreme Court concluded that intentional misstatements in a warrant application do not undermine a search, so long as the application supported probable cause even absent the misstatements.<sup>271</sup> The Massachusetts Supreme Judicial Court adopted this framework as controlling under the state constitution, though it suggested in one case that an affiant's perjurious statements in a warrant application could invalidate the search regardless whether the application otherwise supported probable cause.<sup>272</sup>

Here, then, we have a situation in which path dependence is strong: the state supreme court has already imported the basic federal test into state law, and the state courts have been dutifully applying that test for

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268. In Florida, for example, the state constitution has been amended to provide that the right to be free from unreasonable searches and seizures "shall be construed in conformity with the 4<sup>th</sup> Amendment to the United States Constitution, as interpreted by the United States Supreme Court." FLA. CONST. art. I, § 12. For discussion of the various ways in which the electorate or the legislature can seek to overturn state constitutional individual rights rulings, see WILLIAMS, *supra* note 31, at 128-29.

269. See *supra* notes 6-29 and accompanying text (discussing *Ortiz* case and federal doctrinal structure).

270. *Franks v. Delaware*, 438 U.S. 154 (1978).

271. See *id.* at 171-72.

272. See *Commonwealth v. Nine Hundred and Ninety-Two Dollars*, 422 N.E.2d 767, 771 (Mass. 1981).

many years. It could be argued that other analyses are available—say, one that abandons the harmless-error basis approach of the federal test in favor of one that places more weight on the intrinsic value of the warrant-issuing process. But it is unlikely such an argument would be sufficient to overcome the constraints on the state court's ability to make the investment in time it would take to develop that alternative approach, especially against the years of precedent applying the federal construct under the state constitution.

Further, it should be noted that *Ortiz* is a case, like so many, in which a resort to Romantic subnationalism would be unavailing. There is not likely a unique historical event or state tradition that would justify a departure from federal precedent. As Gardner has noted,<sup>273</sup> the text of the Massachusetts provision is textually distinct from the Fourth Amendment. Where the Fourth Amendment requires that warrants be "supported by Oath or affirmation,"<sup>274</sup> Article 14 of the state constitution requires that warrants must have a "cause or foundation" that is "previously supported by oath or affirmation," and that no warrant should issue except when in accordance "with the formalities prescribed by the laws."<sup>275</sup> But the Massachusetts Supreme Judicial Court has not used these differences to develop a different doctrinal approach, even in respect to the warrant-issuing process.

With what does this leave the advocate in *Ortiz*? It leaves the argument that the federal framework should be applied by the state court in a way that balances differently the interests it was intended to protect—on the one hand, the protection of individual privacy through the requirement of an independently-determined cause to search; and, on the other, the interest in ensuring the government's ability to search will not be unduly restricted by requiring the police to reveal every scrap of information available to them in a warrant application. Rather than seek to articulate a different doctrinal approach under the state constitution, this argument presses for a careful balancing of interests based upon the facts presented under the existing test. It merely suggests, in other words, that the state court need not weigh the interests that the federal framework seeks to protect in the same way that the U.S. Supreme Court would.

A different perspective can mean a great deal where individual rights enforcement is concerned. As Lawrence Sager and others have argued, the U.S. Supreme Court has a tendency to underenforce federal constitutional rights; Sager notes that the evidence of this phenomenon

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273. See GARDNER, *supra* note 3, at 7.

274. U.S. CONST. amend. IV.

275. MASS. CONST. pt. I, art. 14.

includes “a disparity between the scope of a federal judicial construct and that of plausible understandings of the constitutional concept from which it derives, the presence in court opinions of frankly institutional explanations for setting particular limits to a federal judicial construct, and other anomalies.”<sup>276</sup> Accordingly, the fact that the Massachusetts court is not, in *Ortiz*, creating rules of criminal procedure for the nation is significant—it means, at a minimum, that the court can balance the interests in individual privacy and law enforcement efficiency without anxiety over the costs and consequences that balancing may create in jurisdictions with varying resources.

Of course, a different balancing of interests ought to have some basis. As in any constitutional case, the state court must be able to justify its understanding of the way in which the applicable principles should be applied in the matter at hand. In *Ortiz*, the balancing of interests in *ex post* review of the warrant-issuing process can be informed by those cases in which the state court has elaborated upon its conception of the protection against unreasonable searches and seizures—which is to say, the protection of individual privacy from unwarranted government intrusion. The Massachusetts Supreme Judicial Court held, for example, in *Commonwealth v. LaFrance*,<sup>277</sup> that search warrants may issue on less than probable cause in the case of probationers.<sup>278</sup> Under federal law, no warrant is needed to conduct probation searches, but the Massachusetts Supreme Judicial Court could find no sound reason “to eliminate the usual [constitutional] requirement imposed . . . that a search warrant be obtained.”<sup>279</sup> As the court put it, “[r]equiring an officer to articulate reasons for the search is a deterrent to impulsive or arbitrary government conduct,” and that is what the search and seizure protection is “about.”<sup>280</sup>

Here, then, is a possible state constitutional argument in *Ortiz*: under the state protection against unreasonable searches and seizures, an affiant may not exclude from the warrant application any evidence that could have influenced a magistrate’s determination that probable cause to search did or did not exist, such as an unsuccessful identification procedure. Why? Because, as past state constitutional cases like *LaFrance* show, the warrant itself is the most significant constitutional safeguard of individual privacy: the need for a warrant deters “impulsive

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276. Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1218-19 (1978); see also WILLIAMS, *supra* note 31, at 173-74.

277. *Commonwealth v. LaFrance*, 525 N.E.2d 379 (Mass. 1988).

278. See *id.* at 380.

279. *Id.* at 382.

280. *Id.* at 383 (quoting *State v. Griffin*, 388 N.W.2d 535, 545 (Wis. 1986) (Abrahamson, J., dissenting)).

or arbitrary government conduct.”<sup>281</sup> Nonetheless, in the interests of practicality, affiants need not detail all that they know, and immaterial omissions will not invalidate a search. Arguably, in the circumstances of *Ortiz*—which involves witness identification of a shooter—an unsuccessful identification should not be considered immaterial to the probable cause determination.<sup>282</sup> The limits on “materiality” in this context can await development in other cases; such a determination is not beyond the judiciary’s competence.<sup>283</sup>

This argument falls within the bounds of the doctrinal framework for judicial review of the warrant-issuing process adopted by the Massachusetts Supreme Judicial Court from the federal courts. The argument suggests that, to the extent the warrant-issuing process is primarily concerned with the protection of privacy, the framework may be applied in a way that credits the interest in privacy—and the detrimental consequences to privacy of sanctioning harmless-error review of probable cause determinations—differently than the federal courts have. After all, the U.S. Supreme Court may have initially developed this doctrinal test, but that does not necessarily mean that a state court, any more than a differently-configured Supreme Court, must value the interests the test seeks to protect in precisely the same way.

In pursuing this kind of state constitutional argument, state courts may effectively challenge the U.S. Supreme Court’s hold on individual rights interpretation while managing the costs associated with an independent inquiry into the optimal approach to effectuating a constitutional command. Such challenges are in accord with various normative visions of numerous state constitutional law scholars. James Gardner, for example, has suggested that state judges should self-consciously use state constitutionalism as a bulwark against federal hegemony in the area of individual rights.<sup>284</sup> Robert Schapiro has similarly argued that different state constitutional interpretations of common rights protections create an alternative jurisprudential vision that serves to balance the interpretive efforts of the U.S. Supreme Court.<sup>285</sup> Paul Kahn has reasoned that state constitutionalism essentially

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281. *Id.*

282. The Massachusetts Supreme Judicial Court ultimately dismissed the appeal in *Ortiz* after being informed of the defendant’s death while the court had the matter under advisement. See Notice of Docket Entry, *Commonwealth v. Ortiz*, No. SJ-10466 (May 18, 2010).

283. See, e.g., *Commonwealth v. Madigan*, 871 N.E.2d 478, 482 (Mass. 2007) (discussing standard of materiality in context of evidence).

284. See, e.g., GARDNER, *supra* note 3, at 254-56 (reasoning that different levels of government may act independently to secure individual rights).

285. See, e.g., Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 288-90 (2005).

provides “a forum for discussion, disagreement, and opposition to actions of the national government.”<sup>286</sup> And I have argued that state constitutionalism promotes dialogue between the state and federal systems about the meaning of our constitutional commitments to individual rights and liberties, and that a state court’s contribution to this dialogue need not depend upon the existence of a uniquely state-based distinction between the texts.<sup>287</sup>

These normative threads support a decidedly functional account of what state courts can accomplish when they engage in independent state constitutionalism—even when they operate under resource constraints.<sup>288</sup> Were the Massachusetts Supreme Judicial Court to have accepted the hypothetical defendant’s argument in *Ortiz* which I have outlined here, and endorsed a different way of understanding how the *Franks* test could be applied, it would have acted (consciously or not) to counter the federal understanding of how the protection against unreasonable searches and seizures should work in the warrant context. Its decision could then inform future constitutional arguments about this and like issues—for constitutionalism, as Kahn has recognized, is “not a single set of truths, but an ongoing debate about the meaning of the rule of law in a democratic political order.”<sup>289</sup>

Indeed, every individual rights case in which a state court resolves the balance of competing interests under a given doctrinal framework differently than would a federal court makes that state court decision a thread in the discussion about how we should be valuing such interests as privacy, autonomy, free expression, equality, and due process in our constitutional democracy. Each of these state constitutional individual rights decisions, moreover, could serve as an entrance by a state court into a dialogue with the U.S. Supreme Court about these issues and,

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286. Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1166 (1993).

287. See Friedman, *supra* note 121, at 95-97 (arguing that state constitutional interpretation serves a checking and balancing function). Alternatively, Long sees independent state constitutional interpretation as serving to “teas[e] out and bolster[] the strands of culture that center on the state as a community,” a process that aids in the identification of states as distinct, autonomous communities. Long, *supra* note 1, at 102.

288. See, e.g., GARDNER, *supra* note 3, at 17 (maintaining that “[f]unction” . . . provides the key to distinguishing state from national constitutions”).

289. Kahn, *supra* note 286, at 1147-48. I should be clear here that I do not mean to suggest that no state courts are approaching state constitutional individual rights decisions in the way that Gardner, Kahn, and others have suggested; to the contrary, many do, as decisions like *Canelo* and *Baker* demonstrate, and there are numerous other examples. See, e.g., John Palfrey, *The Public and the Private at the United States Border with Cyberspace*, 78 MISS. L.J. 241, 288 n.134 (2008) (citing cases in which state courts have applied search and seizure framework to provide greater privacy protection than federal courts have provided individuals under the Fourth Amendment).

perhaps, influence a constitutional discourse that includes not just the nine justices in Washington, but also their colleagues in other federal and state courts, as well as scholars and jurists here and abroad.<sup>290</sup> All of this, potentially, from state courts simply considering anew the possibilities contained in federal doctrinal constructs.

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While the pull of path dependence is strong, that does not mean state courts must be eclipsed by the U.S. Supreme Court when it comes to the hard work of implementing constitutional individual rights protections. State courts can make a valuable contribution toward ensuring that established doctrinal frameworks serve to implement these protections adequately and appropriately. The contributions of the state courts to constitutional discourse may not in the end be what the proponents of independent state constitutionalism had envisioned, but they are no less needed, or welcome, for being somewhat more modest.

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290. See Lawrence Friedman, *Reconsidering Rational Basis: Equal Protection Review Under the Wisconsin Constitution*, 38 RUTGERS L.J. 1071, 1084-85 (2007) (discussing the importance of independent state constitutional decisions to constitutional discourse about “how the balance between our need for order and our commitments to individual rights . . . ought to be struck”).